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1. Church—Europe—U. S.

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The Church and the Law.

By the Same Author.

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BY H. J. DESMOND.

Benziger Bros., Publishers,

NEW YORK.

CONTENTS:

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The Church and the Law

WITH SPECIAL REFERENCE TO ECCLESIASTICAL LAW IN THE UNITED STATES.

By

HUMPHREY J. DESMOND

OF THE WISCONSIN BAR.

CHICAGO:
CALLAGHAN AND COMPANY,
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1898.

PREFACE.

The aim of the writer, in preparing the following chapters, has been to state, briefly, the general principles of the law under the several topics touched upon, rather than to deal with details, or attempt to summarize statutory provisions which are so subject to frequent change and amendment.

The *point of contact* between the Church and the Law is always kept in view; and matters extraneous to this plan of treatment are omitted, although seeming at times to belong to the interest awakened.

It is believed that this little work will serve as a convenient hand-book to clergymen on a variety of topics, that are certain, from time to time, to engage their attention, and upon which the skill of a lawyer who knows where "to find the law" is usually appealed to. The well informed layman will also find much to interest him in these pages; and, while the book is intended for the general reader, it may not be found out of place in the library of the lawyer who wishes to be able to refer conveniently to a range of topics, not heretofore included in a single volume.

Contents.

THE CHURCH AND THE LAW.

I.

THE SOURCE OF CIVIL AUTHORITY.

IN some of the American constitutions we have traces of that discussion as to the "source of civil authority" which became acute when the great Catholic theologians attacked the doctrine of "the divine right of kings" as propounded by James I., and which later gave to the world Rousseau's book on the "Social Contract," the theories of which were in much favor at the time our constitution was adopted.

The framers of the American state constitutions were careful to indicate their belief as to the source of political power, probably by way of protest against "the divine right of kings." Thus the constitutions of Alabama (I, 3), of Arkansas (I, 1), of California (I, 2), of Connecticut (I, 2), of Florida (Declaration of Rights, I), of Iowa (I, 2), of Kansas (Bill of Rights, 2), of Kentucky, (XIII, 4),

of Nevada (I, 2), of New Jersey (I, 2), and of Ohio (I, 2), expressly declare that "all political power is inherent in the people." The constitutions of Missouri (I, 4), of North Carolina (I, 2), and of South Carolina (I, 3), state the same doctrine by declaring that "all political power is vested in and derived from the people." The constitution of Vermont (I, 6), says: "That all power being originally inherent in, and consequently derived from, the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants, and at all times in a legal way accountable to them." The constitution of Massachusetts (I, 5) declares that "all power residing originally with the people, and being derived from them, the several magistrates and officers of government vested with authority, whether legislative, executive or judicial, are the substitutes and agents, and are at all times accountable to them."

The following extract will indicate, for comparison, the teaching of the churchmen on the subject:

"It has commonly been taught in the schools, especially since the time of the great Angelic Doctor, that civil authority is received by human society immediately from God; but the person that rules over civil society receives his supreme authority to govern immediately from the people, and mediately, or through the people, from God. This thesis enunciates the true and sound doctrine concerning

the origin of civil authority....."—Hill's Moral Philosophy, p. 276.

Perhaps we may say, however, that the churchman's view is sufficiently covered by the recognition and acknowledgment of God in the preambles of at least two-thirds of the American state constitutions. These references are contained in expressions such as the following:

"We, the people of the state of Alabama, ... invoking the favor and guidance of Almighty God, do ordain," etc.

"We, the people of Arkansas, grateful to God for our civil and religious liberty, ..."

"We, the people of the state of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this constitution, ..."

"Feeling our dependence on Him .... do ordain and establish a free and independent government," in Iowa.

"Imploring His aid and direction," in Maine.

"Devoutly imploring His direction," in Massachusetts.

"Acknowledging our dependence upon Him," in Missouri.

"Looking to Him for a blessing upon our endeavors," in New Jersey.

"Acknowledging our dependence upon Him," in North Carolina.

"We, the people of Texas, acknowledging with

gratitude the grace of God, in permitting us to make choice of our own form of government, do hereby ordain," etc.

"Invoking the favor and guidance of Almighty God," as in Virginia.

The expression of gratitude to Almighty God is found in the constitutions of thirty states, varied in many instances with additional words, such as those above quoted, imploring the guidance and blessing of the Creator upon the work of the framers.

II.

CANON LAW IN THE COURTS.

THE terms "ecclesiastical law" and "canon law" should not be confounded. The former relates to ecclesiastical matters, but owes its enactment and sanction to the civil authority. Canon law is a compilation of rules and laws relating to faith, morals, and discipline, laid down or propounded by the Church or its ecclesiastical authorities, and binding on its members.

In some definitions as, for instance, that given in the Encyclopedia Britannica, canon law is limited so as not to include matters of faith or dogma; but the Council of Trent called its decrees "canons," whether they referred to matters of faith or morals. —See Addis and Arnold's Catholic Dictionary.

The sources of canon law are the Bible, tradition, the decrees of councils, Papal constitutions and rescripts, and the writings of the Fathers of the Church. The civil or Roman law is also an important source of the canon law, especially as determining the external polity of the church. The decisions of the Roman congregations are included in canon law and the various concordats or treaties, made by the

Holy See with different countries for the regulation of ecclesiastical affairs, are also within the scope of canon law. We may say, therefore, that ecclesiastical law, as above defined, is one of the sub-divisions of canon law.

The influence of canon law upon the growth of our civil or common law has been very important. We need but reflect, for a single instance, on the fact that it has virtually determined the rule of the descent of real property. In another way it figures as a vital fact in our modern courts: it is appealed to as determining the relations between ecclesiastical persons and the tenure of church property; and the actual decisions of ecclesiastical courts, have a well established status before our civil tribunals.

In Stack *vs.* O'Hara, (98 Pa., 213), the court is obliged to recur, in determining the terms of the compact between priest and bishop, to the canon law of the Church. The court, in its opinion, quotes from the enactments of the Second Plenary Council of Baltimore, and cites such approved works on canon law as Smith's "Elements of Ecclesiastical Law."

In Leahey *vs.* Williams (141 Mass., 335), the court said: "The authority which the bishop delegates to the priests must be authority vested in them under ecclesiastical law, and *prima facie* is ecclesiastical authority." Here the decrees of the Second Plenary Council of Baltimore were put in evidence and virtually determined the case.

"It is no innovation upon the law of evidence,

in determining questions like the one at bar, to call, in aid of the civil tribunal, upon the law of the particular church involved, for the purpose of determining the title to church property. It surely is not unreasonable, in a case like the present, to hold one of the great prelates of the church of Rome to the terms upon which, by the very law to which he has vowed his fealty, he has consented to accept legal title to the property which is appointed to the uses of the church, to whose service he has with most solemn unction dedicated his life.—Mannix *vs.* Purcell, 46 O. St., 136.

"The decision of ecclesiastical courts, or officers having, by the rules or laws of the bodies to which they belong, jurisdiction of such questions or the right to decide them, will be held conclusive in all courts of the civil administration, and no question involved in such decisions will be revised or reviewed in the civil courts, except those pertaining to the jurisdiction of such courts or officers to determine such questions according to the laws or usage of the bodies which they represent."—Justice Redfield in 15 Am. Law Reg., 277, quoted with approval in 98 Penn., 213.

Civil courts will not review the action of ecclesiastical tribunals, except where rights of property are involved. 62 Ia., 567; 23 Ill., 456.

Justice Strong, of the Supreme Court of the United States, in his lectures on the "Relations of Civil Law to Church Policy", (p. 41), speaks of the Church

"as an interior organization within a religious society," and adds (p. 42):

"I think it may be safely asserted, as a general proposition, that whenever questions of discipline, of faith, of Church rule, of membership, or of office have been decided by the Church in its own modes of decision, civil law tribunals accept the decisions as final and apply them as made."

Our American courts have not been steadied to these views without some earlier divergencies, such as appear in 33 Vt., 602, and 90 Penn., 477, referred to in later chapters of this book.

III.

RELIGIOUS LIBERTY.

AS the legislative powers of Congress are limited to those expressly granted to it by the constitution, and as there is no power therein granted to make laws respecting an establishment of religion, the first amendment of the constitution was not strictly necessary. Still, so that there should be no uncertainty upon this subject, the first amendment provided that "Congress shall make no law respecting an establishment of religion or prohibiting the exercise thereof." That section (Sec. 2, Art. IV) of the federal constitution, which provides that "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," has been held by the United States Supreme Court to have no reference to the question of religious liberty. (16 Wallace, p. 36.) Neither would the provision of the fourteenth amendment, that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States" have any special reference to this matter.

By the tenth amendment to the constitution, the several states retained "all the powers not delegated to

the United States by the constitution nor prohibited by it to the states." Judge Story, in his "Commentary on the Constitution" (Sec. 1879), remarks that "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their sense of justice and to the state constitutions."

For years after the federal constitution was adopted there was, in several of the states, a species of state support of the Protestant form of religion. In the newer states, the constitutions invariably contained provisions safeguarding religious liberty and prohibiting the establishment of state churches. In the older states, progress towards religious equality proceeded by constitutional and legislative enactment.

Cooley, in his work on Constitutional Limitations (p. 515), enumerates as among those things which are not lawful under any of the American constitutions:

1. Any law respecting an establishment of religion.

2. Compulsory support by taxation, or otherwise, of religious instruction.

3. Compulsory attendance upon religious worship.

4. Restraints upon the free exercise of religion according to the dictates of conscience.*

5. Restraints upon the expression of religious belief.

*See Appendix A.

"The legislature," says Judge Cooley, "has not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious denomination or mode of worship. .....It is not toleration which is established in our system, but religious equalty." (Const. Lim., ch. 13. Vidal *vs.* Girard's Executors, 2 How., 198. Bloom *vs.* Richards, 2 Ohio St., 390.)

The constitutions of thirty states of the Union prohibit religious tests for holding of office; but by the constitutions of Arkansas, Mississippi, North Carolina, South Carolina, and Texas, a man who denies the existence of God is ineligible for office, and by the constitutions of Delaware, Maryland, Kentucky, and Tennessee, clergymen are excluded from civic office. The constitution of New Hampshire permits the legislature to authorize the several towns to make "adequate provision, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion, and morality." This anachronism in an American constitution is, however, a piece of "innocuous desuetude."

IV.

SECTARIAN INSTRUCTION.

THE constitutions of Wisconsin and Nevada expressly prohibit sectarian instruction in the common schools, and the Supreme Court of the former state, in a leading case (76 Wis., 177) has decided that Bible reading in the public schools is sectarian instruction. This passage, from that decision, indicates the reasoning of the court:

"That the reading from the Bible in the schools, although unaccompanied by any comment on the part of the teacher, is 'instruction,' seems to us too clear for argument. Some of the most valuable instruction a person can receive may be derived from reading alone, without any extrinsic aid by way of comment or exposition. The question, therefore, seems to narrow down to this: Is the reading of the Bible in schools—not merely selected passages therefrom, but the whole of it—sectarian instruction of the pupils? In view of the fact already mentioned, that the Bible contains numerous doctrinal passages, upon some of which the peculiar creed of almost every religious sect is based, and that such passages may reasonably be understood to inculcate the doctrines predicated upon them, an affirmative

answer to the question seems unavoidable. Any pupil of ordinary intelligence, who listens to the reading of the doctrinal portions of the Bible, will be more or less instructed thereby in the doctrines of the divinity of Jesus Christ, the eternal punishment of the wicked, the authority of the priesthood, the binding force and efficiency of the sacraments, and many other conflicting sectarian doctrines. A most forcible demonstration of the accuracy of this statement is found in certain reports of the American Bible Society of its work in Catholic countries * (referred to in one of the arguments), in which instances are given of the conversion of several persons from 'Romanism' through the reading of the Scriptures alone; that is to say, the reading of the Protestant or King James version of the Bible converted Catholics to Protestants without the aid of comment or exposition. In those cases the reading of the Bible certainly was sectarian instruction. We do not know how to frame an argument in support of the proposition that the reading thereof in the district schools is not also sectarian instruction."

The force of this decision would extend to many other states where sectarian instruction, in the public schools, is prohibited by statutory enactments.

The Wisconsin decision, in the opinion filed by Chief Justice Cassoday, further argues that Bible reading in the public schools may be worship in a sense which would make the school room "a place of

* See Appendix B.

worship," and is such use of the public schools as the taxpayers have a right, under Sec. 18, Art. I, of the constitution, to object. And such Bible instruction would also make the public school "a religious seminary" for the support of which no money shall be drawn from the public treasury (Art. I, Sec. 18, of the Wisconsin Constitution).

This reasoning would exclude the Bible from the public schools of every state, even where the prohibition against sectarian instruction is not in the constitution or the statutes: for, in the constitutions of all the states, as Judge Cooley says, "compulsory support by taxation or otherwise of religious instruction" is not permitted.

A case, decided more than forty years ago (1854) by the Supreme Court of Maine (Donahue vs. Richards, 38 Me., 389), seems directly opposed to the Wisconsin decision. But the Maine case has never found approval elsewhere, and its conclusions were afterwards virtually controverted by the Supreme Court of Massachusetts (12 Allen, 27) in an interpretation of portions of the Massachusetts constitution, almost identical with the article in the Maine constitution, discussed in 38 Me., 389.

The Wisconsin case is generally regarded as establishing the trend of judicial decision on this question.

V.

CHRISTIANITY AND THE COMMON LAW.

I. THE COMMON LAW.

THE English common law includes the general customs and usages, the *lex non scripta*, the immemorial law as laid down by the treatises of the old law writers, the judical decisions, and the amendments and modifications introduced by acts of parliament.

This common law, as it existed at the time of the emigration of the colonists (4 James I.), or, (in other states) at the time of the Declaration of Independence (July 4, 1776), so far as it is applicable to our situation and consistent with our constitutions and laws, is in force in the United States. (18 Wis., 147.) Louisiana, where the civil and Roman law prevails, forms, however, an exception.

While, with reference to the force of English statutes, the older states of the Union adopt the English common law as it existed prior to the fourth year of James I., other states, such as Rhode Island, Florida, Wisconsin, and Nevada, adopt the English common law as it existed down to July 4, 1776. In

Iowa the supreme court recognizes all English statutes enacted prior to 1707, the date of the union of the English and Scottish crowns. (4 Iowa, 381.)

The decisions of English courts, where such decisions were rendered prior to the American Revolution, are, generally speaking, of equal force with the decisions of our own courts in determining the common law; and English decisions subsequent to July 4, 1776, are valuable and persuasive in interpreting that law; but they are not authoritative.

2. LORD HALE'S MAXIM.

Lord Chief Justice Hale, in an early case (Taylor's Case, 1 Vent., 293), originated the maxim: "Christianity is parcel of the laws of England." It has since been reaffirmed frequently in England that "Christianity is part of the law of the land." (Rex *vs.* Woolston, 2 Strat., 834.)

The meaning of the expression is practically limited to the prohibition of openly reviling, blaspheming or ridiculing the teachings of Christianity —such conduct being regarded as subversive of the law.

In the United States the weight of opinion seems to regard such acts as the reviling of Christianity and blasphemy, as temporal offences, not punishable because Christianity is part of the law of the land, but because such words tend to provoke a breach of the peace.

"The free, equal and undisturbed enjoyment of religious opinion, whatever that may be, and free and decent discussions on any religious subject are granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community is an abuse of that right ..... Wicked and malicious words, writings and actions, which go to vilify those Gospels, continue, as at common law, to be an offense against the public peace and safety."—Chief Justice Kent, 8 Johnson, p. 290.

Sedgwick, in his treatise on the "Construction of Statutory and Constitutional Law" (p. 14), says: "It is often said that Christianity is part and parcel of the common law. But this is true only in a modified sense. Blasphemy is an indictable offense at common law; but no person is liable to be punished by the civil power who refuses to embrace the doctrines or follow the precepts of Christianity. Our constitutions extend the same protection to every form of religion and give no preference to any."

John Norton Pomeroy, in his "Introduction to Municipal Law" (p. 292), states, as follows, the general theory, in regard to religion, on which our national and State constitutions proceed: "The theory of our national and State constitutions is that the State, as an organic body, has nothing whatever to do with religion, except to protect the individuals in whatever belief and worship they may adopt; that religion is entirely a matter between each

man and his God; that the State, as separated from the individuals who compose it, has no existence except in a figure; and that to predicate religious responsibilities on this abstraction is an absurdity. Whatever, then, the State does, whatever laws it makes touching religious subjects, are done and made, not because the State is responsible, but simply that people may be secure in the enjoyment of their own religious preferences."

The courts have referred to the expression "Christianity is part of the law of land" as "said indefinitely," (1 P. and W., Pa., 12) as "true in a qualified sense only," (33 Barber, 548) or as an "assertion" that "can hardly be serious" (23 Ohio St., 211). "If Christianity is a law of the state, like every other law, it must have a sanction," says the Ohio Supreme court. And of course it has no legal sanctions. The Kansas Populist, who some time ago introduced a bill to enact the ten commandments, with appropriate penalties, understood this. The New York authority, above cited, limited the meaning of the maxim "to the extent that entitles the Christian religion and its ordinances to respect and protection as the acknowledged religion of the people." "But further the law does not protect it," says Gibson J., of Pennsylvania, and the only "excuse" for the maxim, in the opinion of the Ohio authority cited, is "the fact that it is a Christian country, and that its constitution and laws are made by a Christian people," (23 Ohio, St., 211.)

3. SUNDAY LAWS.

The Sunday laws of the various states are enacted as civil regulations by virtue of the police power of the state. There is no purpose to compel a religious observance or to prescribe a special belief. The Supreme Court of Pennsylvania (8 Pennsylvania, 312) makes this very clear statement: "All agree that for the well-being of society, periods of rest are absolutely necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed may enjoy a respite from labor at the same time ..... In a Christian community, where a large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that that day should have received the legislative sanction. And as it is also devoted to the religious observances, we are prepared to estimate the reason why the statute should speak of it as the Lord's Day and denominate the infraction of its legalized rest, a profanation. Yet this does not change the character of the enactment. It is still essentially but a civil regulation for the government of man as a member of society."

Similarly the Supreme Court of Alabama (40 Alabama, 445) said: "The legislation on the subject of abstaining from all employments on the first day of the week must be referred to the police power of the state. It has its sanction in the teaching of

experience that the general welfare and good of society requires a suspension of labor and business one day in seven and that the day should be of uniform observance. "Referring to the Sunday laws the Supreme Court of Ohio said (2 Ohio State Reports, 387): "We are then to regard the statute under consideration as a mere municipal or police regulation, whose validity is neither strengthened or weakened by the fact that the day of rest it enjoins is the Sabbath day"

These are but a few of the authorities which indicate that our Sunday laws have nothing to do with the Christian Sabbath as a religious observance, or with Sunday as a divine institution. Sunday laws are grounded upon the usage of the people, their convenience and the well order of society. These laws are, in all the states, statutory regulations. In the constitution of Vermont, however (Part I., Art. 3), occur the words, "Every sect or denomination of Christians ought to observe the Sabbath or Lord's Day and keep up some sort of religious worship."

We may summarize the general scope of the Sunday laws of the various states as follows: They prohibit the serving of any process of any court on Sundays; they prohibit certain forms of amusement, such as shooting, hunting, and all servile labor, except works of necessity and charity. They also prohibit traffic, and especially they prohibit the sale of intoxicating liquors on Sundays. Courts are not to be opened on Sundays. Prohibition against doing

any form of labor or business or work on the Sabbath day, is the ground upon which courts decline to sustain actions on contracts made on Sunday, because no one can be permitted to maintain in a court of justice any right founded on, or growing out of an illegal transaction.

4. BLASPHEMY AND PROFANITY.

Chief Justice Shaw defines the police power of the state to be the power vested in the legislature by the constitution "to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same." (7 Cushing, p. 84.)

The laws against profanity and blasphemy are inserted in the New York revised statutes under the title "Relating to the Punishment of Immoral and Disorderly Practices." The spirit of the laws against blasphemy and profanity is thus indicated by Judge Cooley, in his work on Constitutional Limitations: "The criminal laws of every country have reference, in a great degree, to the prevailing public sentiment, and punish those acts as crimes which disturb the peace and order, and tend to shock the moral sense of the community. The moral sense is measurably regulated and controlled by the religious belief; and therefore it is that those things which are estimated,

by a Christian standard, as profane and blasphemous, are properly punished as offensive, since they are offensive in the highest degree to the general public sense, and have a direct tendency to undermine the moral support of the laws and corrupt the community."

5. OATHS AND WITNESSES.

There are some provisions in the state constitutions bearing on the subject of the civil oath, and intended to exclude any religious test as to the competency of witnesses. These varying provisions may be found in the following state constitutions: Arkansas (I, 21); California (I, 4); Florida (Declaration of Rights), (5); Indiana (I, 7); Iowa (I, 4); Kansas (Bill of Rights), (7); Michigan (VI, 34); Minnesota (I, 17); Nebraska (I, 16); Nevada (I, 4); New York (I, 3); Ohio (I, 7); Oregon (I, 6); Wisconsin (I, 19.)

The statutes of New York prescribe that one who gives testimony in a court of justice may either take an oath by laying his hands upon and kissing the gospels, or answering in the affirmative: "you do swear, in the presence of the ever living God," holding up his right hand according to his discretion; or by declaring in the affirmative to the following form: "You do solemnly, sincerely and truly declare and affirm." Every person believing in any other than the Christian religion shall be sworn according to the ceremonies of his religion. Bouvier, in his

Law Dictionary, informs us that the Jew is sworn on the Old Testament, with his head uncovered; the Mohammedan on the Koran; the Brahmin by touching the hand of another Brahmin; the Chinaman by breaking a china saucer. The Bible is not an indispensable requisite in the administration of an oath. (8 New York Reports, 4 Seld., p. 67.)

Bouvier, in his Law Dictionary, defines an oath to be "an outward pledge, given by the person taking it, that his attestation or promise is made under an immediate sense of his responsibility to God." The whole purpose of the civil oath is to assist the ends of justice by throwing around witnesses every incentive to speak the truth, to promote their veracity with the aid of their most earnest convictions. The liberality of the law in permitting believers to swear according to the ceremonies of their own religion, and permitting non-believers to simply affirm, indicates that there is in the civil oath, as administered in courts of justice, no invasion of the rights of conscience and no purpose to recognize or establish a state religion.

6. CHAPLAINS EMPLOYED BY THE STATE.

The President of the United States is authorized, with the consent of the Senate, to appoint some thirty-four army chaplains, and not to exceed twenty-four navy chaplains.

In the army the chaplains rank as captains, receiving the same salary. The authority of Congress to provide for army and navy chaplains is said to be derived from the general power to raise and support armies, and "to provide and maintain a navy." Congress also has two chaplains under the general power of each house of congress to employ officers of its own.

There is no limitation in the law, requiring national chaplains to be of any special religion. They must be "accredited ministers of some denomination."

As a matter of usage the sessions of the state legislatures are opened with prayer by a clergyman of some Christian denomination. At times this practice has been interrupted, as in New York; and in some states, as in Michigan and Oregon, the state constitutions provide that "no money shall be appropriated for any religious ceremonies in either house" of the legislature.

While many of the state constitutions provide that no money shall be appropriated from the treasury for the benefit of any religious sect, there is a common practice of regarding the condition of criminals in state prisons as forming an exception. State prison chaplains are employed and paid out of the public treasury.

In many states, both a Catholic and a Protestant clergyman are thus employed by the state prison authorities, as in Wisconsin.

The statutes of New York provide for the appointment, to each regiment or battalion, of one chaplain "who shall be a regularly ordained minister of some Christian denomination." This policy is followed in other states, but the chaplain receives nothing for his services.

VI.

SOME OBSOLETE LAW.

I. "BENEFIT OF CLERGY."

THE churchmen of the middle ages insisted that persons in holy orders, who happened to offend against the criminal laws, should be tried in the ecclesiastical, and not in the civil courts. This was conceded; and, therefore, the plea of "benefit of clergy" transferred the offender, charged with felony, to the ecclesiastical court, where usually an acquittal followed.

Upon the whole, considering the severity of the criminal code, and the number of offences punishable by death, this plea substantially served the cause of justice. Later, it was extended so as to protect all who could read and write, but the laity could employ it on the first offence only. And before the lay offender, so pleading, was let go, he was branded on the thumb, so that if he came up again for any offence, he could not get off by pleading "benefit of clergy" and reading the "neck verse," as the writing used to test one's ability to read, was called.

The plea of benefit of clergy was never allowed in case of treason, and it was restricted and modified by

numerous statutes. When the severity of the criminal code was mitigated, its *raison d' etre* ceased. It was finally abolished in England by Stat. 7 and 8, Geo. IV. (1827).

The now obsolete plea has, however, figured in some of the earlier American law reports. In an early Indiana case (1 Blackf, Ind., 66) the court used this language: "It is said that the court below erred in refusing to the prisoner the benefit of clergy. As to this objection, there surely can be but one opinion. The benefit of clergy never was properly a common law privilege (1 Chitty, Crim. Law, 667). It originated, with that of sanctuary, in the gloomy times of popery. It was the offspring of that absurd and superstitious veneration for a privileged order in society which, unfortunately, existed in those ages of darkness, when the person of a clergyman was considered sacred, and church yards were viewed as consecrated ground. The statutes of England on the subject are local to that kingdom. They were not made in aid of the common law, and are certainly not adopted as the laws of our country."

An opposite view prevailed in some early cases, passed upon by the supreme courts of the Carolinas and Virginia. In 6 Jones (N. C.) it is held that women are entitled to benefit of clergy.

By act of Congress (Apr. 30, 1790, Sec. 30) benefit of clergy is abolished in the federal courts, and many of the states have by statute (as in Sec. 4636, R. S. of Wis.), or by adjudication, outlawed the plea. We

may speak of it as universally obsolete as far as American and English law is concerned.

2. MORTMAIN.

The Mortmain statutes of mediæval England were intended to keep lands from accumulating in the possession of the Church. The great nobles lost certain services and charges when a landed estate became the property of a religious order or corporation. We find the first attack in Magna Charta (9 Henry III., ch. 36), where the granting of lands to religious houses is prohibited.

The great Mortmain statutes are those of 7 Edward I. and 15 Richard III. Corporations are made "dead hands" (hence *mort main*), incapable of receiving property.

But the religious corporations eventually got around these statutes by obtaining from the King what were known as "licenses in Mortmain"—permission to hold lands, sold or given.

Up to Henry VIII.'s time, land could not be granted by will. When the right to devise land by will was created (32 Henry VIII., ch. 1) corporations were excluded; they could not be the recipients of realty devised them by will. Such devises were void. But later on this obstacle was surmounted by interpretations of the Charitable Trust Act (43 Elizabeth, ch. 4). A corporation might take real property for charitable uses.

There are more than two dozen English Mortmain statutes, several of them improperly so called, like that of 9 George II., ch. 36. The old Mortmain policy of mediæval England is now virtually uprooted in that country. It has never existed, either by statute or otherwise, in the United States, although the Supreme Court of Pennsylvania once indicated that the statutes of Mortmain might be held effective against devises to superstitious uses (1 Watt's, 219).

Of course, there are some statutes, in several of the states, limiting the extent to which property may be devised for religious and charitable purposes, and regulating wills in this behalf. (See Chapter VIII (1) of this book). While they are slightly related to the old Mortmain policy, they are not, properly speaking, Mortmain acts.

3. "PRÆMUNIRE."

A "provisor," according to the parlance of the middle ages, was one nominated by the Pope to a benefice before it became vacant, to the prejudice of the patron of the benefice. Under Edward I. (35 Edw. I., ch. 5) a statute against provisors was enacted. It was the beginning of a series of anti-papal statutes, whereby the English kings sought to control the church in England as against the authority of the Pope. In 1392 the famous statute of Præmunire, 16 Rich. II., ch. 5, was enacted.

This provided for a writ, the opening words of

which were "*Præmunire facias*" ("be forewarned"), and which was to be sued out, not only against provisors, but against any one who resorted to the Roman curia rather than the courts of England, or who published Papal bulls in England without the permission of the King. It was subsequently extended to include a variety of offences.

Henry VIII. used this writ to overthrow Cardinal Wolsely, and it was the keynote of his campaign against Papal supremacy in England.

Bishop Stubbs, in his summary of the præmunire statutes, says that 16 Rich. II., ch. 5 was the strongest piece of anti-Papal legislation throughout the whole middle ages. It may be mentioned as an English phase of the quarrel between the Popes and the Emperors.

4. THE RIGHT OF SANCTUARY.

The right of sanctuary was established and regulated in England by numerous statutes (see Coke's Institutes, III., p. 115), during the middle ages. Under James I., Parliament swept the right away (21 Jac. I., c. 28, sec. 7). It has no longer any existence, in the ecclesiastical sense, in English or American law.

In the old Catholic times, the church and the churchyard were quite universally sanctuary — wherein the fleeing criminal, as well as the victim of lawless violence, was free from arrest and molesta-

tion. In England, the felon fleeing to the sanctuary might, within forty days, confess his crime, take an oath of abjuration, and be banished to a foreign clime.

There are numerous references, in English literature, to this custom. In Shakespeare's Richard III. (Act 3, scene 1), when it was found that one of the princes, afterwards murdered in the Tower, had "taken sanctuary," the Lord Cardinal says:

> "God forbid
> We should infringe the holy privilege
> Of blessed sanctuary: not for all the land
> Would I be guilty of so great a sin."

But Buckingham speciously argues:

> "You break not sanctuary in seizing him:
> The benefit thereof is always granted
> To those who do deserve the plea
> And those who have the wit to claim the plea.
> This prince hath neither claimed it nor deserved it."

5. "SUPERSTITIOUS USES."

In 1547 the English Parliament enacted (I. Edw. VI., ch. 14) that the king should be entitled to all real, and certain specific personal property *theretofore* disposed of for the perpetual finding of a priest, or maintenance of any anniversary or obit, or any other thing, or any light or lamp, at any church or chapel.

The English chancellors found a "public policy" which enabled them to give this statute a continuing and an enlarged force, making void all bequests for masses, prayers, bringing up children in the Catholic

faith, etc. This appears to be the present law in England, but not in Ireland or Canada, where no such public policy is perceived to exist.

The doctrine of superstitious uses is not recognized in the United States. "As in this country, from the very nature of its institutions, what was at one time known in England as superstitious uses, have no recognition in our laws, and as all the various dogmas of the several Christian sects are to be treated with equal reverence and respect, a religious or charitable bequest, whether for the founding of a church or to purchase masses for the dead, must be regarded as valid." Gordon J. in Seibert's Appeal, 18 W. N. C. (Pa.), 276. Expressions to the same effect are found in 108 N. Y., 302, and numerous other American decisions. (See 5 Am. & E. Encyl. of Law, 2d Ed., 928.)

VII.

THE SEAL OF THE CONFESSIONAL.

"A CLERGYMAN, or other minister of any religion, shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs [without consent thereto by the party confessing]."

Thus reads Section 4074 of the Wisconsin Statutes. The New York statute is identical, except as omitting the bracketed phrase. More than twenty other states have similar provisions in their statutes. (Arizona, Arkansas, California, Colorado, North and South Dakota, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, Ohio, Oregon, Utah, Washington, Wyoming.) See American and English Encyclopedia of Law, article on "Privileged Communications"

The absence of such statutes in the New England and the Southern states does not imply that confessions are not also privileged communications in those states. "Even in the absence of statutes, prosecuting officers and courts are reluctant to compel the pro-

duction of such evidence," says the American and English Encyclopedia of Law, citing cases in point.

It was the rule of the Roman law that confessions to a clergyman were privileged communications, and, as such, not to be made the subject of disclosure on the witness stand. Of course, such is now the law in France, Italy, Spain, and other continental countries.

Best, the learned author of a work on Evidence (Sec. 583-4), proves that prior to the Reformation such was also the law in England (citing Henry I., ch. 5, and 9, Edw. II., ch. 10). Justice Stephen, in his work on Evidence, referring to this matter, and to a pamphlet by Mr. Baddeley, making an argument that confessions to a priest were privileged before the Reformation, and that the privilege has never been taken away—says that our law of evidence has grown up since the Reformation, when exceptions in favor of auricular confessions were not likely to be made.

While the American courts have never compelled priests to testify as to matters confided to them in the confessional,* and while even in states like Virginia, where there is no statutory exemption to protect the privileged character of such communications, the privilege has nevertheless been recognized, and will, no doubt, be recognized; yet, such actual deci-

* Haggeman, in his work on "Privileged Communications" (p. 123), cites Baker vs. Arnold, I. Caines Rep. (N. Y.), 258, (a case which arose in 1813, prior to the present New York statute) as a decision against the privileged character of confessions to a priest. Reference to the case shows that it deals with a communication to a lawyer only.

sions as are found in England are adverse, and lean to the view that courts may assume to compel the priest to testify.

The most direct case was one decided in the Irish courts in 1802, Butler vs. Moore (McNally Ev., 253-4), where the judge ruled that a priest should answer certain interrogatories as to a matter of which "he had knowledge, if at all, only professionally."

This case, and another of a less direct character, are cited by the text writers in support of the opinion which they seem to inculcate against the privileged character of confessions to priests. (1. Greenleaf Ev., sec. 247; Phillips Ev., 109, Starkie, 40.) But we may say, in the words of Justice Stephen, that "the matter has as yet never been solemnly decided in England."

To subpœna Catholic clergymen, as witnesses, concerning matters confessed to them, would, in the words of Wharton, "plunge the state into a war with an ancient and powerful communion—a war in which that communion could yield nothing, having only two alternatives equally deplorable, its triumph over the state, or the general imprisonment of its priests and the suppression of its worship." Wharton, Ev., sec. 596.

In Scotland (Tait, Ev., 386-7) confessions to a clergyman before trial are privileged.

VIII.

BEQUESTS TO CHARITY.

1. RESTRICTIONS ON GIFTS TO CHARITY.

SOMETHING of the old mortmain policy of the English law appears in the statutes of nearly half of the American states, in restrictions against gifts to charity and religion. These restrictions are of several kinds: a man may give in certain cases only part of his estate to charity; if he gives land, in some states it must be by deed; in other states, a will, giving property to charity or religion, must be made some months before the testator's death.

A law was enacted in Wisconsin in 1891, providing that wills containing a gift to charity must be made at least three months prior to the testator's death. This law was repealed in 1893, but meanwhile the Milwaukee Protestant Home for the Aged lost a valuable piece of real estate in consequence of the law. (Mil. Prot. Home vs. Becher, 87 Wis., 409.)

In New York, where a testator has a wife, husband, child or parent, not more than half his estate may be left to charity, and the will must be made at least two months prior to the testator's death. There is a

similar law in Georgia, Idaho, and Montana, limiting the bequest or devise to one-third of the estate.

In Illinois, religious corporations may hold land to the extent of twenty acres; in Kentucky, fifty acres. In Missouri, a devise of land for religious purposes is limited to one acre; in Maryland, to five acres.

In Pennsylvania, a will containing a gift or devise to charity or religion is invalid if made within one month of the testator's death; in Ohio, one year. In Delaware, grants of realty for such purposes must be made by deed, at least one year before the death of the grantor.

The new constitution of Mississippi, 1890, seems to prohibit all charitable bequests and devises, except of personal property, in trust, to a corporation for charitable purposes.

2. CHARITABLE USES.

It sometimes happens that a bequest for masses, or for other charitable purposes, may stand or fall in the courts, depending upon the question whether "the doctrine of charitable uses" is adopted by the courts in the states where such cases arise.

The law of charitable uses is a policy which inclines courts to specially favor what they regard as charitable gifts and bequests, and the trusts created thereby; and to uphold them, if there is any reason-

able way to do so. If the will, in such, cases be loosely drawn, if there be question as to who is the beneficiary, if there be loop holes which would invalidate an ordinary private trust, the courts (where the statute of charitable uses is in force) will, nevertheless, sustain the bequest and the trust, and order the will of the testator "carried out as nearly as possible" (which is sometimes called the doctrine of *cy pres*).

In New York, Wisconsin, Michigan, Indiana, Maryland, and Minnesota, the doctrine of charitable uses does not prevail, generally on account of statutory provisions to the contrary. In the New England states, Illinois, Missouri, and several of the southern states, charitable uses are upheld. In Wisconsin, says the Supreme Court of Illinois (Hoeffer v. Clogan, 49 N. E. Rep., 527), "bequests have been held to be void, which have been uniformly sustained in this court as for charitable purposes."

The courts, of states where the law of charitable uses prevails, have, with some uniformity, defined what is a "charity," such as they will favor as a charitable use. The definition given by Justice Gray of Massachusetts, in Jackson *vs.* Phillips, 14 Allen, 56, was adopted and approved in the case of Crerar *vs.* Williams, 145 Ill., 625, and is frequently cited by text books. It is as follows: "A charity, in a legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, *for the benefit of an indefinite number of persons*, either by

bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."

It has been erroneously held (even by Chief Justice Marshall, in 4 Wheaton, 1,) that this liberal policy of the law dates from the Statute of 43 Eliz., ch. 4 (1601), called the Statute of Charitable Uses.* It is much older, however—appearing in the Justinian Code, as well as in the ancient records of the English courts of chancery long before Elizabeth. The provisions of the Statute, 43 Eliz., ch. 4, are instructive as indicating what classes of gifts are to be regarded as charitable in the eyes of the law.

3. BEQUESTS THAT HAVE FAILED.

The law reports of many states of the Union are strewn with the wrecks of devises and bequests for charitable purposes, creating trusts held to be invalid for various reasons.

These adverse decisions are found chiefly in those states which reject the principle of the statute of

*Subsequently, in Vidal vs. Girard Executors, 2. Howard, 127 (1844), the United States Supreme Court corrected this earlier impression.

charitable uses. Trusts for charitable objects are construed in such states as ordinary legal or statutory trusts, and stand or fall on the rules applicable thereto.

Such trusts must not tie up property and render it inalienable beyond a period prescribed by law (as, for example, beyond two lives in being and twenty-one years more), such limitation being prohibited by the rule against perpetuities. Many bequests to charity, from the very nature of the case, do this. Furthermore, such trusts must be clear and definite, especially as to their beneficiaries, so that the beneficiary can come into court and demand his remedy, if necessary.

The states which adopt this stricter view of bequests to charities, are: California, Delaware, Indiana, Maryland, Michigan, Mississippi, New York, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin.

All uses and trusts, except such as are specially provided for under the statutory law, are abolished in such states as New York and Wisconsin. There are, too, special statutory provisions and regulations, which lead to a varying practice in the several states. Thus, a bequest to an unincorporated society for a charitable object is valid in some states and invalid for the uncertainty of the beneficiary in others.* The

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*In consequence of the public disappointment caused by the loss of the Tilden bequest, the New York legislature in 1893 enacted that "No gift, grant, bequest or devise to religious, educational, charitable or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries of the same." (ch. 701.)

obvious policy of the New York law is to encourage charitable bequests direct to existing charitable corporations.

4. BEQUESTS FOR MASSES.

Bequests for masses are valid in all the United States — the statute against "superstitious uses" having no application here.

Although Redfield, a leading writer on the Law of Wills, perhaps inadvisedly, holds that it does — in which position he is not sustained by other writers, such as Perry on Trusts, Williams on Executors; nor by the decision of any court of final resort.*

In New York it has been held in several cases that a bequest to a named priest, for the saying of masses for the repose of the souls of specified persons, is valid. (Ruppel v. Schlegel, 7 N. Y. Sup., 936; In re Howard's Estate, 25 id., 1111; Vanderveer v. McKane, 25 Abbot's N. C., 105.)

In the case of Schouler, Petitioner, 134 Mass., 426, it was held that a bequest of money for masses was a good charitable bequest of the testatrix, and

* In England bequests for masses have been held void under the statute against superstitious uses; on the other hand bequests for masses have been sustained as charitable bequests in Ireland and in Canada. In Elmsley vs. Madden, 18, Chancery Reports, Ont. (p. 386), where the testator left fifteen pounds to be expended for masses for the repose of his soul, the bequest was upheld. The objection was that this legacy was void as a bequest for superstitious uses. The court was very clearly of the opinion that it was not so but that "on the contrary, the gift in question is free from any taint of illegality."

the court said: "Masses are religious ceremonials or observances of the church of which she was a member, and come within the religious or pious uses which are upheld."

In Pennsylvania, it has been held that a bequest to be expended in masses for the repose of souls is a religious or charitable bequest under the statutes. (Rhymer's Appeal, 93 Pa. St., 142; Seibert's Appeal, 18 W. N. Cas., 276.)

In the McHugh will case (Oct., 1897; 72 N. W. Reporter, 631), the Wisconsin Supreme Court said: "We know of no legal reason why any person of the Catholic faith, believing in the efficacy of masses, may not make a direct gift or bequest to any bishop or priest of any sum out of his property or estate for masses for the repose of his soul, or the souls of others, as he may choose. Such gifts or bequests, when made in clear, direct and legal form, should be upheld, and they are not to be considered as impeachable or invalid under the rule that prevailed in England, by which they were held void as gifts to superstitious uses. No such rule or principle obtains here."

In the Clogan will case (49 N. E. Reporter, 527), the Illinois Supreme Court said:

"The doctrine of superstitious uses, arising from the statute 1 Edward VI, Chap. 14, under which devises for procuring masses were held to be void, is of no force in this state, and has never obtained in the United States. In this country there is absolute

religious equality, and no discrimination, in law, is made between different religious creeds or forms of worship. It cannot be denied that bequests for the general advancement of the Roman Catholic religion, the support of its clergy, are charitable, equally with those for the support or propagation of any other form of religious belief or worship. The nature of the mass, like preaching, prayer, the communion, and other forms of worship, is well understood. It is intended as a repetition of the sacrific on the cross, Christ offering Himself again through the hands of the priest, and asking pardon for sinners as He did on the cross, and it is the chief and central act of worship in the Roman Catholic Church. It is a public and external form of worship,—a ceremonial which constitutes a visible action. It may be said for any special purpose, but from a liturgical point of view every mass is practically the same. The Roman Catholic Church believes that Christians who leave this world without having sufficiently expiated their sins are obliged to suffer a temporary penalty in the other, and among the special purposes for which masses may be said is the remission of this penalty. A bequest for such special purpose merely adds a particular remembrance to the mass, and does not, in our opinion, change the character of the religious service and render it a mere private benefit. While the testator may have a belief that it will benefit his soul, or the souls of others doing penance for their sins, it is also a benefit to all others who

may attend or participate in it. An act of public worship would certainly not be deprived of that character because it was a special memorial of some persons, or because special prayers should be included in the services for particular persons. Memorial services are often held in churches, but they are not less public acts of worship because of their memorial character, and in Durour v. Motteux, supra, the trust for the preaching of an annual sermon in memory of the testator was held to be a charitable use. The mere fact that the bequest was given with the intention of obtaining some benefit, or from some personal motive, does not rob it of its character as charitable. The masses said in the Holy Family Church were public, and the presumption would be that the public would be admitted, the same as at any other act of worship of any other Christian sect. The bequest is not only for an act of religious worship, but it is an aid to the support of the clergy. Although the money paid is not regarded as a purchase of the mass, yet it is retained by the clergy, and, of course, aids in the maintenance of the priesthood."

The general views of the Wisconsin and the Illinois courts, above given, seem identical; yet two bequests in the language herewith quoted were differently disposed of by these courts.

Held Invalid in Wisconsin.

"Fifth—I do give and bequeath unto the Roman Catholic bishop of the diocese of Green Bay, Wis., the sum of four thousand one hundred and fifty dollars ($4,150.00), the said sum to be used as follows: For masses for the repose of my soul, two thousand dollars ($2,000.00); for masses for the repose of the soul of my deceased wife, Mary McHugh, the sum of one thousand dollars ($1,000.00); for the repose of the soul of my deceased son, John McHugh, five hundred dollars ($500).—*Quoted from the McHugh will.*

Held Valid in Illinois.

"Fifth—I give and bequeath unto the Holy Family church (on West Twelfth street), the sum of $1,000 in trust, to be expended in saying masses for the repose of my soul and the soul of my deceased father, Patrick Clogan, mother, Julia Clogan, and sister, Margaret Clogan."—*Quoted from the Clogan will.*

Because the doctrine of "charitable uses" prevailed in Illinois, the court could, as to Clogan's will, say: "We think the devise and legacy charitable, and a rule applicable to trusts is that they will not be allowed to fail for want of a competent trustee. The court will appoint a trustee or trustees to take the gifts and apply them to the purposes of the trust."

But, because the Wisconsin statutes virtually abrogate charitable uses, the Wisconsin Supreme Court was obliged to treat the McHugh bequest as

subject to the rules of a private trust, and, therefore, "void for the reason that there is no beneficiary who may come into a court of equity and enforce performance."

Contemporaneously with the Wisconsin and Illinois cases, above referred to, the Iowa Supreme Court held (December, 1897) that the bequest, "I will and bequeath to the Catholic priest who may be pastor of the B. Catholic church when this will shall be executed, three hundred dollars, that masses may be said for me" was held valid "though it contained no element of a charitable use." Moran vs. Moran, 73 N. W. Rep., 617.

The court (Granger J.) uses this language: "We have said that this bequest, if the priest should accept the money, is a private trust.....But even if there is a technical departure because of no living beneficiary, still the bequest is valid.....In one or more such cases the courts have felt the necessity, in order to sustain such a bequest, to denominate it a "charity," because charitable bequests have had the sanction of the law. We know of no such limitation on testamentary acts as that bequests or devises must be in the line of other such acts if otherwise lawful."

As to the objection that such a bequest is not valid for want of a living beneficiary the court says: "The priest of the church designated, at a special time, is made the person to execute the trust and when he accepts the money he becomes responsible

to the court for the proper discharge of his duties as trustee."

In the same relation the court also said: "It is not wise in such cases for courts to quibble about technical trusts or beneficiaries. Results are of greater importance than technical names and a bequest for a known lawful purpose, where the power of execution is prescribed and available, should never fail for want of a name or a legal classification, unless it is in obedience to a positive rule of law."

The Iowa case is an interesting commentary on both the Illinois and the Wisconsin cases.

Where bequests for masses have been invalidated by the courts, the reason, as we have seen, has been some legal defect, altogether apart from any religious consideration or question of conscience.

We imagine that many bequests for masses have gone into effect simply because they were uncontested; whereas, if the heirs were not faithful members of the Church, or if the sums were not small, such bequests would have been invalidated for reasons similar to those given by the Wisconsin Supreme Court in the McHugh will case.

Bequests for masses, especially in states where charitable uses are not recognized, should be made direct to some designated clergyman, with a simple request that he offer up masses for the repose of the soul

of the testator, or other persons; and, to guard against the precatory words being construed as creating a trust, the bequest should expressly state that there is no intent to create a trust, and that no legally enforceable obligation to say masses is implied, but that the gift is absolute to the legatee named. A bequest so drawn will be valid in any state of the Union.*

* For a full discussion of this subject see "Bequests for Masses" by Wm. Dillon, LL.D., Chicago, 1897. Mr. Dillon represented the prevailing side in Hoeffer vs. Clogan herein before referred to.

IX.

PARENTAL RIGHTS.

I. THE STATE AS PARENS PATRIÆ.

THERE has been a tendency to extend the authority of the state, as *parens patriæ*, by legislative enactment in a direction that encroaches largely on parental authority. Parental rights are not among the personal rights, safe-guarded from legislative abridgment, in "the bills of rights" which form portions of our several state constitutions.

The rights of the parent over his child, while natural, are not inalienable. (4 Whart., Pa., 9.)

"As a general rule, the parents are entitled to the custody of their minor children. When they are living apart, the father is, *prima facie*, entitled to that custody, and when he is a suitable person, able and willing to support and care for them, his right is paramount to that of all other persons, except that of the mother in cases where the infant child is of such tender years as to require her personal care; but in all cases of controverted right to custody, the welfare of the minor child is first to be considered.

"The father's right is not, however, absolute under all circumstances. He may relinquish it by

contract, forfeit it by abandonment, or lose it by being in a condition of total inability to afford his minor children necessary care and support." (32 Ohio St., 299.)

Our civilization has never admitted anything of the spirit of the ten tables of the Roman law, the fourth of which gave the father a right to imprison, and punish, even with death, his children.

It is possible that the tendency among us has been towards the other extreme; and that our courts and legislatures, in making the welfare and the feelings of the child the governing considerations, have not duly considered the care and affection to which the parent is reciprocally entitled from the child.

Nearly thirty years ago (1871) the Illinois Supreme court (People *vs.* Turner, 55 Ill., 280) rendered a decision strongly reasserting parental rights as against the reform and socialistic tendencies of the time. Judge Redfield, in a note in the American Law Register (v. 10 N. S., 372), and Chief Justice Ryan, of Wisconsin (40 Wis., 328), commented upon the wholesomeness of this decision; yet, it may be remarked, that the Illinois Supreme court, in later decisions (as in 104 Ill., 378), rather modified some of the opinions in People *vs.* Turner.

It may be stated generally, that where there is total neglect of the child by the parents, the state may step in and commit the child's care to any suitable person or persons by it selected. This commitment is an act of judicial discretion, and

where it is made (as in Wisconsin) without service of process on the parent, he may, later on, reassert his paramount parental rights as against the person or institution to which his child is committed.

"The authority of the state, as *parens patriæ*, to assume guardianship and education of neglected homeless children, as well as neglected orphans, is unquestioned. The institutions of public charity for this purpose, in this state, are a subject of just pride to every citizen. The provisions of law, under which these institutions are maintained, should receive such a construction as will not defeat their humane intention."—Honse of Refuge *vs.* Ryan, 37 O. St., 197.

2. THE PARENT AND THE SCHOOL.

In the winter of 1872-3, Annie Morrow, a teacher in one of the district schools of Grant county, Wisconsin, sought to compel a son of James Wood to pursue the study of geography as against the express wish of his father. The Supreme Court of Wisconsin (35 Wis., 59) decided that she exceeded the authority which the law gave her. The court said:

"In our opinion there is a great and fatal error in asserting or assuming the law to be that, upon an irreconcilable difference of views between the parent and teacher, as to what studies the child shall pursue, the authority of the teacher is paramount and controlling. We do not understand that there is any

recognized principle of law, nor do we think there is any recognized rule of moral or social usage, which gives the teacher an absolute right to prescribe or dictate what studies the child shall pursue, regardless of the views or wishes of the parent."

The Wisconsin case created, at the time, widespread interest in educational circles. It was perceived to be a leading case; and it has since been followed by other courts and by the educational department in New York and elsewhere.

"The policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated during minority, presuming that his natural effections and superior opportunities of knowing, the physical and mental capacities, and future prospects of his child, will ensure the adoption of the course which will most effectually promote the child's welfare." (87 Ill., 303.)

Rulison vs. Post, 79 Ill., 567, takes grounds similar to Morrow vs. Wood (35 Wis., 59), but State vs. Webber, an Indiana case (28 Am. L. Reg., 319), is of a different view.

In Ferriter vs. Tyler, 48 Vt., 444, it was held that a school committee might suspend for the term children who had absented themselves for the purpose of attending religious services on Corpus Christi day, following the direction of their parents and the priest; this decision was upon the ground that the statutes gave the school committee full power to make all requisite regulations for the government of the school.

The validity of compulsory education laws and child labor laws is now generally conceded. "It is to be remembered that the public has a paramount interest in the knowledge and virtue of its members," says the Pennsylvania Supreme Court (4 Whart., 9), and on this theory it steps in to protect its future citizens from neglect and ignorance *

In April, 1890, Rev. Patrick Quigley, a Catholic pastor of Toledo, Ohio, refused to give a list of the pupils in his parish school to a truant officer acting under the provisions of the Ohio compulsory education law. The matter went into the courts upon an issue testing the constitutionality of the compulsory education law in question. The law was upheld by the Supreme Court at the January, 1892, term. (State of Ohio vs. Quigley.)

3. CUSTODY OF CHILDREN.

Mixed marriages, divorces, commitments to public institutions, and disputes among relatives, frequently result in contests for the custody of children.

* During the political agitation in Wisconsin called "the Bennett Law campaign" the three Catholic prelates of the state issued a protest, (March, 1890), in which, with reference to the subject of compulsory education, they propounded this view: "Parents have the duty to educate their children because under God the children belong to the parents who have to give to Him an account of them. This most sacred duty necessarily gives them also the inalienable right to educate their children. . . . . There may be cases in which parents either grossly neglect their duty or positively abuse this right to the damage or ruin of their children. It is only in such cases that the state, as the custodian of the rights of its citizens, is justified and obliged to step in and make parents do their duty or punish them for the abuse of their right."

At common law, the paramount right of the father to the custody of his minor children was always recognized, except in cases where he was grossly unfit.

But at present, the governing consideration with courts, in awarding such custody, is the welfare of the child. In England, during Victoria's reign, two important statutes (Talford Act, 2 Vic., ch. 54, and Infants' Custody Act, 36-7 Vic., ch. 12) have been enacted, favoring custody by the mother in certain cases, upon application by her to the court of chancery.

In American cases, the paramount right of the father is generally admitted; but courts incline to give the care of very young children to the mother. "Where the father is a man of a fair character, of a just disposition, and is able and willing to take care of and provide for his children, he is vested with the paramount right to their custody. The only exception to this is the case of an infant of tender years, whose helpless condition and tender wants require the nurture of its mother." (State *vs.* Bratton, 15 Am. Law Reg , N. S., 379.)

Courts, in using their discretionary powers to award custody of children, may be guided more or less by the preferences of the child, where the latter has attained "an age of discretion"—usually placed at the age of fourteen years in England, and many of the American states, but in some states at an earlier age, if, in the judgment of the court, the child evinces a sufficient capacity.

The statutes of Wisconsin (Sec. 3964) provide that "the father of the minor, if living, and in case of his death, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the custody of the person of the minor and the care of his education."

In divorces, the custody of the children is a matter left to the discretion of the court, and its jurisdiction is a sort of continuing jurisdiction, for it may modify and revoke the order which it has originally made, and transfer the custody of the child whenever the interests of the latter require it.

The defendant is rarely given custody of the children, especially if the offence be adultery, cruelty, or drunkenness; an exception being made, however, where nurture is required (56 Mo., 329). Where one parent is as worthy as the other, courts give the preference to the father (76 Ill., 399.)

Touching the matter of religious training, it is the settled rule in England that the father has the right to have his children educated in his own religion. Should he die and leave no specific instructions on this point, nevertheless it is presumed, that his wishes were that his children shall be educated in his own religion. The American courts have had little occasion to approach this question. There is a Missouri case (*In re* Doyle 16, Mo. App., 159) which lays down the rule that "in *habeas corpus* proceedings for the possession of a child, it

should be intrusted, if in other respects its interests can be as well subserved, to the custody of a person of the same religion with its parents."

In a Delaware case the Court said:

"The appointment of a guardian by the Orphans' Court might be governed by reference to the faith of the minors' parents, if brought especially to the notice of the court, and there appeared to be a design to obtain the guardianship with the intent to seduce the child from the belief of its fathers."—Lynch vs. Bratton (15, Am. L. R., p. 366.)

X.

MARRIAGE AND DIVORCE.

THERE is nothing in the marriage or divorce laws of any of the American states to prevent a strict churchman from living up to the most rigid regulations of his creed. The law allows of everything the practical churchman may do*; but it also allows of wonderfully large and varying degrees of action and conduct, in the way of marriage and divorce, which are forbidden by the Church.

Upon certain grave and serious matters related to marriage and divorce, the Law and the Church are in agreement; the state lends its aid to enforcing the morality which the Church inculcates.

Thus, while in the eyes of the law, marriage is a civil contract, it can not anywhere be rescinded by mere consent of the parties as other civil contracts may.

Some form of celebration, either civil or religious, is provided for in all of the states; although in most of the states no religious celebration, nor indeed a civil celebration, is absolutely essential to a valid

*Divorces *a mensa et thoro* are not allowed, however, in some states, as in Connecticut. And some of the southern states are very rigid in prohibiting marriages with quadroons and octoroons.

marriage. Maryland is the only state in which a a civil marriage is not allowed; the ceremony must be performed by an ordained minister.*

A license to marry is required in all except seven of the states (Michigan, Montana, New Jersey, New Mexico, New York, South Carolina and Wisconsin); but publication of the bans will serve this purpose in Delaware and Ohio.

All the states prohibit marriages between lineal descendants; most of them prohibit marriages between nephews and nieces and first cousins.

On the question of affinity† the American law is not particular. Some states prohibit marriage to a deceased wife's sister, such marriages being absolutely void in Virginia. In the southern states there is a

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* Dennison vs. Dennison, 35 Md., 621. This was the rule in England before the Protestant Reformation.

†"Consanguinity is either lineal or collateral. Lineal is that which subsists between persons of whom one is descended in a right line from the other. Every generation in this direct line constitutes a degree Collateral consanguinity is that which subsists between persons who lineally descend from the same ancestor who is the *stirps* or root." (McDowell vs. Addams, 45 Penn. St., 430.)

Affinity is defined "as the connection existing in consequence of marriage between each of the married persons and the kindred of the other." (Bouvier Law Dic.) Its degrees are computed in the same way as those of consanguinity.

In the Catholic Church parties related to each other by blood to the fourth degree, that is third cousins inclusively, are forbidden to intermarry on grounds of consanguinity.

Affinity, to the fourth degree is also a bar; that is, a widower may not marry any of his deceased wife's relatives as far as third cousins inclusively, nor a widow any of her deceased husband's relatives as far as third cousins inclusively.

variety of legislation against the miscegenation of white and negro blood.

The statutes of every American state (except South Carolina) specify from two to ten grounds for absolute divorce. These grounds of divorce, all-in-all, number more than twenty: but, (1) Adultery; (2) Desertion; (3) Imprisonment in state's prison; (4) Cruel and inhuman treatment; and (5) Habitual drunkenness, are the usual causes. In some states one or more of the grounds for divorce are such as ecclesiastical courts might recognize as nullifying the marriage. In these instances the decree is not properly called divorce, but rather "a decree of nullity." In Massachusetts, New Hampshire and Kentucky "joining the Shakers" is a ground for divorce—that sect not believing in the institution of marriage.

The divorce problem in the United States has become a serious one in two ways:

First, as a growing fact. In Massachusetts there was one divorce to fifty marriages in 1869; one to thirty-nine in 1865; one to twenty-one in 1878. In Rhode Island, one to fourteen in 1869; one to nine in 1879. In Ohio, one to twenty-six in 1865; one to eighteen in 1878. In Chicago, one to ten in 1876; one to eight in 1880. In Baltimore, one to sixty-two in 1880; one to thirty-five in 1886.†

†The Law of Divorce, Lloyd, Boston: Houghton, Mifflin & Co.

Dr. Woolsey, formerly president of Yale college, in his well known work on "Divorce and Divorce Legislation," says:

"Here one thing stands out prominently, and that is that commonwealths, founded by the Puritans, and the parts of other states, settled by their descendants, seem to be the chief abodes of divorce."‡

Second, by the conflict of laws. In some of the western states a short residence of two or three months entitles parties to sue for divorce in the courts of the state. As a consequence, residents of New York, where the divorce laws are strict (only two causes for divorce being allowed), seek divorces in states where the divorce laws are lax; and, having secured their decree, return to New York to reside. The courts of New York have been called upon to recognize such proceedings and to give validity to them. Utah divorces of this kind are now usually held void; and the courts are inclining to examine the *bona fide* character of such residence (as affecting the matter of jurisdiction) when it is taken up merely for the purpose of getting a divorce. "If there was domicile necessary to give the jurisdiction, and the defendant appeared to the suit, then the judgment would be everywhere in our country of absolute force," says Bishop ("Marriage and Divorce.") "If the plaintiff only had a domicile, and there was no notice to the defendant within the jurisdiction, then

‡See Appendix C.

the decree could affect only the plaintiff's status of marriage."

Another remedy has been suggested in the direction of a national divorce law; which, of course, cannot be secured until the Federal Constitution is amended so as to enable Congress to legislate therein.

XI.

CHURCH PROPERTY.

I. THE TENURE OF CATHOLIC CHURCH PROPERTY.

GENERAL laws for the incorporation of religious societies have been on the statute books of most of the American commonwealths from the earliest days of their statehood.* As far back as 1813 a special provision was made in New York for the incorporation of the Protestant Episcopal Church. It was the mediæval Church that introduced the corporation, as a creature of the law, to English jurisprudence. The Catholic Church, however, during the first half of the present century seemed reluctant to organize itself as a civil corporation or to seek special legislation for such incorporation.

In 1855 the New York legislature, doubtless moved by nativistic prejudices, passed a law intended to make it desirable for the Catholic Church to incorporate. This enactment, which was of doubtful constitutionality, provided that no title to

*In West Virginia the constitution prohibits the granting of charters of incorporation to any religious society.

real property should be conveyable or descendible by an ecclesiastic to his successor in office (Laws of 1855, ch., 230). There are traces of similar legislation in other states.

Later (Ch. 45, Laws of 1863) the New York legislature enacted a special act for the incorporation of Catholic churches, upon which act are modeled provisions for the same purpose in the statutes of Wisconsin and Minnesota.

Justice Strong, of the United States Supreme Court, says: "Almost all, if not all, the questions mooted in the civil courts of this country, relating to church polity, discipline, officers or members, have arisen incidentally in controversies respecting church property." (Relations of Civil Law to Church Polity, p. 40.)

The reluctance of the Catholic Church authorities to vest their property in "creatures of the law," might well have transpired through a disposition to await the attitude of courts towards the canon law; or to witness evidence of the ineffectiveness of those waves of prejudice that began to assail the Church during its first period of rapid growth. Possibly, too, some of the early troubles of the Church authorities with "trusteeism" may have had an influence.

"The Third Plenary Council of Baltimore, in its decrees on the subject of church property, urges the bishops to place all church property under the protection of legal incorporation, where it can be done

safely, as in the state of New York; where such incorporation can not be made, it requests the bishop to have himself made a corporation sole, and thus hold the property as any other corporation would; and where this can not be done it permits him to hold the property in fee simple." So wrote Rev. J. M. Farley, now Bishop Farley, of New York, in The Forum for June, 1894.

In Maryland, the Archbishop of Baltimore holds all church property as a "corporation sole." This title was obtained from the legislature of Maryland by Archbishop Whitfield. Its powers and scope were enlarged in the time of Archbishop Spalding, and again in the time of Archbishop Bayley, and also in the time of Cardinal Gibbons.

By an act of the Massachusetts legislature (Chap. 506, A. D., 1897) "the present Roman Catholic Archbishop of the archdiocese of Boston, and his successor in office, shall be and are made a body politic and corporation sole" to receive, take and hold, by sale, gift, lease, devise or otherwise, real and personal property of every description for religious, charitable, and burial purposes.

In the Chicago archdiocese all diocesan property is held by "the Catholic Bishop of Chicago" as a corporation sole; he is responsible for all matters pertaining to its administration. This is in accordance with the statutes of the state of Illinois.

In Missouri, Michigan, Ohio, Indiana, and Iowa, the Catholic church property is held in the name

of the Bishop or Archbishop, of course, subject to canonical laws, which virtually make him a trustee. (46 Ohio St., 136.)

Under the provisions of the California code, the church property in the several Catholic dioceses within that state, is held by the Bishop or Archbishop as a corporation sole. Section 602 of the California code provides:

"Whenever the rules, regulations, or discipline of any religious denomination, society or church, so require, for the temporalities thereof, and the management of the estate and property thereof, it shall be lawful for the bishop, chief priest, or presiding elder of such religious denomination, society or church, to become a sole corporation, in the manner prescribed in this title, as nearly as may be, and with all the powers and duties, and for the uses and purposes in this title provided for religious incorporations, and subject to all the provisions, conditions, and limitations in said title prescribed."

By special statutory provisions for the incorporation of Catholic church property in New York, the Archbishop or Bishop, the Vicar General, the pastor of the congregation and two laymen, the latter two being selected by the three first mentioned or by a majority of them, form the board of directors. All Catholic congregations are incorporated in New York according to the laws of the state of New York.

In Wisconsin (Sec. 2001—10-17) R. S. (ch. 37, Laws of 1883) "the bishop of each diocese, being the only

trustee of each Roman Catholic church in his diocese, may cause any or all congregations therein to be incorporated by adding four more members as trustees as hereinafter provided. The bishop and vicar general of each diocese, the pastor of the congregation to be incorporated, together with two laymen, practical communicants of such congregation (the latter to be chosen from and by the congregation) shall be such trustees."* In Minnesota and North and South Dakota the tenure of Catholic church property is similar to that in Wisconsin.

2. THE EXEMPTION OF CHURCH PROPERTY FROM TAXATION.

Many of the state constitutions prescribe uniformity and equality of taxation, but this is held (as in 76 Wis., 587) not to prohibit the legislature exempting certain classes of property. The power to tax being an essential of the sovereignty of the state, every presumption is in favor of the state in case of doubt; therefore, statutes exempting property from taxation are strictly construed. Local assessments levied against church property exempt from taxation are, under this view, valid charges against such property.

Another instance of the strict construction of exemption statutes, is the manner in which courts rule that only property necessary to the special

*See Appendix D.

purpose (church or educational) is exempt and such property must be exclusively used for the purpose which dictates the exemption. In New York, where the basement of a synagogue was used for a bathing establishment, the synagogue deriving profit therefrom, the property was held not exempt (1 N. Y. Supp., 35).

The classes of property usually exempt from taxation are: (1) that of religious societies; (2) that of educational organizations; (3) eleemosynary institutions; and (4) cemeteries.

The constitution of Minnesota (IX. 3,) declares that "all churches and church property used for religious purposes and houses of worship * * shall by general laws be exempt from taxation." The Arkansas constitution (X. 2) provides that "houses used exclusively for public worship * * shall never be taxed." And the Kansas constitution has a similar exemption clause. The constitution of Alabama (XIII, 4) exempts the property of "educational and charitable corporations" only.

In all the other states the power of exempting church property is substantially left to the legislature.

"If the state may cause taxes to be levied from motives of charity or gratitude, so for like reasons it may exempt the objects of charity or gratitude from taxation," says Judge Cooley (Constitutional Limitations, p, 515).

With the single exception of California, every state in the Union exempts church property from taxation. The various statutory provisions vary in their terms and liberality on this subject. In the state of Washington, for instance, exemption from taxation is limited to churches wherein the pews are free to the public. The grounds upon which the church is located are also exempt "to a reasonable size for its location" in Illinois, to the extent of ten acres in Indiana and Wisconsin, etc. Church property in the District of Columbia is exempt by act of Congress.

In 1875, President Grant, in his annual message to congress, recommended the taxation of church property as a national and state policy. He estimated that the church property of the country in 1900 would reach three billions in valuation. In 1870 its value was $355,000,000. In 1890, $681,000,000. At that rate of increase it would not reach even a billion dollars in valuation until long after 1900. The church property of the leading denominations in 1890 was valued as follows: Methodists, one hundred and thirty-two millions; Catholics, one hundred and eighteen millions; Presbyterians, ninety-five millions; Baptists, eighty-four millions; Episcopalians, eighty-three millions; Congregationalists, forty-three millions; and Lutherans, thirty-five millions.

This does not, of course, include the property of private educational and eleemosynary institutions.

XII.

DISTURBANCE OF RELIGIOUS WORSHIP.

THE disturbance of religious services is an offence punishable under the common law. There are, however, statutory penalties in most states.* They regulate but do not abrogate the common law offence. "Any person who shall at any time wilfully interrupt or molest any assembly or meeting of people for religious worship or for other purposes, lawfully and peacefully assembled, shall be punished by fine not exceeding fifty dollars nor less than five dollars." (R. S. of Wis., sec. 4,597.)

In New York it is made "unlawful for any person wilfully to disturb, interrupt or disquiet any assemblage of people met for religious worship, by profane discourse, by rude and indecent behavior or by making a noise either within the place of worship or so near it as to disturb the order and solemnity of the meeting." (R. S., Part I., ch. 20.)

It is important in some states to describe, in the indictment, the place of the disturbance, in order to identify the offence. A religious meeting held on

*Fully set forth in Tyler's Am. Eccl. Law and in the later work of Alpha J. Kynett.

a street corner, is not disturbed by conduct that in a regular place of worship would subject the disturber to punishment (64 Mo., 386). The question as to what constitutes disturbance of religious meetings is a question of fact, depending on the nature and purpose of the meeting and the usages and practices in vogue. The disturbance must be wilful and not merely an accidental act.

Cracking and eating nuts during service (3 Tex. App., 116); attempting to reply to the minister (34 N. Y., 141); fighting at the church door (8 Lea, Tenn., 565); giggling during prayer (7 Tex. App., 204); using profane language towards a worshipper, although heard only by him (41 Ark., 110), are instances of what the courts have regarded as molesting religious worship. The disturbance may occur outside the assembly and even after the congregation are dismissed and are on their way home.

It has been necessary for the New York courts to rule that leaving church during service is not a disturbance of religious worship. And in North Carolina it was unsuccessfully sought to punish a man, as a disturber of worship, because he sang discordantly when the congregation arose to sing. Mere heedless conduct, even if slightly mischievous, is not "a disturbance" of religious worship.

There is a general conviction throughout the several states that liquor selling in close proximity to churches is inappropriate. Thirty-three of the states have legislation of some kind on this subject;

and in many of them such legislation appears to be classed under the title of "disturbing public worship." While Wisconsin, Illinois, Iowa, and Missouri, have such legislation chiefly for the purpose of keeping liquor stalls and tents from one to four miles away from any camp or field meeting, Kentucky prohibits the buying or selling of liquor within one mile of a church during divine service; and there is a Pennsylvania law in force (passed in 1822) punishing any one who comes within three miles of a church with a booth, stall, or boat to sell liquor during divine service. There is a similar provision in Maryland, and also in several of the Southern states.

XIII.

FREEDOM OF WORSHIP IN PRISONS AND REFORMATORIES.

WHEN, in 1881, Governor Cornell, of New York, vetoed a bill for the establishment of freedom of worship in institutions of the poor, he advanced the peculiar doctrine that "to be able to enjoy freedom of worship presupposes certain conditions, important among which is the ability of independence or self-maintenance." A struggle for the rights of conscience of the inmates of prisons and reformatories has transpired in different states of the Union; this movement has been chiefly under Catholic auspices.

In England, under the Act of 31 and 32, Victoria, Chap. 122 (1868), it is provided that a record shall be kept of the religious creed of the inmates of workhouses and pauper-schools and that they shall be entitled to the ministration of a clergyman of their religion. Furthermore, that "no child in the workhouses or schools, visited by a clergyman of his own religion, shall be required to attend any other religious services unless, being above the age of twelve years, he should desire to do so."

In 1874–5 a Liberty of Worship bill was passed by the Ohio legislature, which provided that "as liberty of conscience is not forfeited by reason of the commission of crime, or by reason of any detention in any penal reformatory or other state institution, no person in any such institution shall be compelled to attend religious worship or instruction of a form which is against the dictates of his or her conscience," and providing further for such inmates receiving the ministrations of clergymen of their own religion, "provided such ministration shall entail no expense on the public treasury." It is singular that so reasonable a law should have encountered so strong an opposition in Ohio that it was repealed in 1876.

At present, New York, Pennsylvania, Massachusetts, Kentucky, and Wisconsin, have upon their statute books provisions guaranteeing to the inmates of prisons and reformatories freedom of worship. In Massachusetts no inmate of any prison, jail, or house of correction, shall be denied the free exercise of his religious belief and liberty of worshipping God according to the dictates of his conscience, "within the place where such inmate may be kept or confined." This statute, however, was not sufficient, in the judgment of the Supreme Court, to enable a priest to hear the confession of an inmate of a state institution without the presence in the same room or cell of the keeper or his wife. There is a Pennsylvania statute providing that "all persons committed to the Western House of Refuge shall be allowed, in all cases of

sickness, spiritual advice or ministration by the clergyman of the denomination to which said inmate shall belong." Such advice or ministration to be obtained within sight of the person having said inmates in charge but "not within hearing." This is evidently intended to respect the rights of the Catholic confessional. The Kentucky statute on this subject is very full and inclusive. Its first section is similar to the Wisconsin statute which is here subjoined. The Wisconsin law was passed during the session of the legislature in 1891:

An act to secure religious freedom in public reformatories and prisons.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. All persons committed to any reform school, prison, or other place of confinement or commitment, in this state, shall be allowed spiritual advice and spiritual ministration from any recognized clergyman of the denomination or church to which such persons so committed may respectively belong or have belonged prior to their being so committed or confined. Such advice and ministration shall be given within the reform school, prison, or other place of confinement, in such manner as will secure to such persons the free exercise of their belief, and under such reasonable rules and regulations as the officials in charge of such place of confinement may prescribe.

SECTION 2. This act shall take effect and be in force from and after its passage and publication.

Approved April 17, 1891. (Ch. 300, Laws of 1891

XIV.

QUESTIONS OF CHURCH MEMBERSHIP.

IN a New Jersey case (Den v. Bolton, 12 N. J. L., 206) Ewing, C. J, said: "To constitute a member of any church, two points at least are essential, without meaning to say that others are not so: a profession of its faith and a submission to its government. Simply holding the same faith without submitting to the government and discipline of a church cannot make or keep a man a member of the church." A similar view has been expressed by the highest courts of Massachusetts (16 Mass., 488) and Pennsylvania (43 Pa. St., 244). "Every person entering a church implicitly, if not expressly, covenants to conform to its rules and to submit to its authority and discipline," says the American and English Encyclopædia of Law (v. 20, 781).

Virtually, therefore, our courts decline to have anything to do with questions of church membership or expulsion therefrom. The action of the church or of the church authorities being ascertained, courts do not pass the same in review.

"Questions in regard to the eligibility of applicants for admission, or in regard to the expulsion of members from the spiritual body, are determined by the several creeds, articles or confession of each sect or denomination, and are beyond the cognizance of the law." Beach on Private Corporations, v. I, sec. 60.

"Over the church, as such, the legal or temporal tribunals of the state do not profess to have any jurisdiction whatever, except so far as is necessary to protect the civil rights of others and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatories to which they have voluntarily subjected themselves," says Walworth, Ch. (First Bap. Church vs. Witherell, 3 Paige, N. Y., 296.)

In the Catholic Church, excommunication is an ecclesiastical censure by which a Christian is cut off from communion with the Church. In one class of cases he who does or neglects to do certain things "will incur excommunication" but the sentence is not actually incurred until it is pronounced by a competent judge. In another class of cases excommunication is incurred, *ipso facto*, by doing certain things specified, and no formal sentence is necessary. There is a major and a minor excommunication; and of the major kind the most severe is that which cuts the excommunicated person off from not only religious but civil relations with members of the church. (See

Addis and Arnold's Catholic Dictionary, article "Excommunication.")

It is this latter form of excommunication, and the method of its pronouncement, which may raise some question as to the harmony of the church and the law. Reference is made, in the chapter on the "Privilege of the Pulpit," to a Massachusetts case (Morasse vs. Brochu, 151 Mass., 567) which illustrates this contingency.

XV.

THE CHURCH PEW.

QUITE a volume of law relating to church pews has accumulated since the Protestant Reformation (before which time pews were not usual in churches). In England a pew is merely an easement in the church, and the pewholder's right is usufructary. But in America, in the absence of statutes to the contrary, the pewholder's interest is considered real estate, with all the incidents of real property. In Massachusetts, by statutory provision, pews are personal property.

The pewholder's right, however, is subject to the paramount rights of the congregation. The congregation may alter or remove, or tear down the church and build elsewhere, discontinue public worship, or modify and rearrange the pews. They may even change the mode of worship (24 Am. Dec., 223). The pewholder can maintain no action in such cases. If for mere convenience or ornament, the congregation should disturb any one in the use of his pew, they are, however, obliged to compensate him.

The New York courts have had occasion to rule that the pewholder has no exclusive right to the soil

beneath his pew or to the timber or material of which the church or any of its parts are composed (32 Barber (N. Y.) 234)

Deeds and leases of pews may contain such conditions as will protect fully the interests of the church and regulate the use of the pew.

"Each pewholder," says the Maine Supreme Court (59 Me., 250), "has a property in his pew and the right to its exclusive occupation. But the right was subject to the paramount rights of the parish. . . . It had the control of the house, the right to determine at what hours on the Sabbath and at other times it should be open for public worship, etc."

If a pewholder feels himself disturbed in the enjoyment of his pew he may bring an action for trespass on the case. He is justified when in possession of a pew to hold it even by force as against an intruder with no title.

In O'Hear vs. De Goesbriand et al (33 Vt., 602), the court said: "It appeared on the trial that the controlling of a pew in a church by a layman is forbidden by the canons or ecclesiastical law of that [the Roman Catholic] church and that plaintiff was a layman. But the canon law of the Roman Catholic church, considered in reference to any intrinsic obligation, has no force or authority in this state. It is a law of the church and not of the state, and is not to be considered in determining the legal rights of the parties, except so far as it was recognized in

or made part of the agreement or contract under which those rights are derived."

Chief Justice Redfield, of Vermont, who had resigned from the bench just before the term of court at which this case was decided, subsequently, as editor of the American Law Register, criticised this decision (15 Am. L. R., p. 280) quite severely on the ground that the court "utterly ignored the cardinal principle that all members of voluntary societies retain their privileges therein, subject to the rules of such societies."

XVI.

CHURCH CEMETERIES.

THE bodies of the dead belong to their surviving relatives to be disposed of as they see fit, subject, of course, to public sanitary regulations. (Bogert *vs.* Indianapolis, 13 Ind. R., 434.)

The right of burial usually conveyed by written instruments in a church yard cemetery, is either an easement or a license, and not a title to the freehold. (McGuire *vs.* St. Patrick's Cathedral, 54 (Hun.) N. Y., 207.)

Where, for instance, the certificate of purchase reads, "to have and to hold the lots for the use and purpose and subject to the conditions and regulations mentioned in the deed of trust to the trustees of the church," this was construed as a mere license; and, as such, revocable.

The regulations of the church may, and usually do, limit the right of interment in the cemetery to those who die in communion with the church, and the courts have held that the church is the judge in this matter. (113 Ind., 114, 54 Hun. (N. Y.), 210.)

Some years ago, one C, a Catholic, received from the proper officer of a Catholic cemetery, a receipt

for seventy-five dollars, being the purchase money for a plat of ground in the cemetery. C died a Free Mason and the cemetery authorities would not allow his body to be buried in the lot which he had bought. The case went to the highest courts in New York and the cemetery authorities were upheld, it satisfactorily appearing that the rules of the Catholic church forbid the burial, in consecrated ground, of one who is not a Catholic or who is a member of a Masonic fraternity. 21 Hun. N. Y., 184.)*

Bishop Dwenger, of the Fort Wayne diocese, secured an injunction against one Geary, who desired to bury the body of his suicide son in a lot owned by him (Geary) in the Catholic cemetery. The supreme court of Indiana upheld the bishop. (113 Ind., 106.)†

While the right of eminent domain may be invoked to condemn lands for cemetery purposes, the

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*A case differently disposed of, occurred in 1875, at Montreal, where one Guibord was buried in the Catholic cemetery under command of the civil court, as against the objection of the church authorities. Guibord was an ex-communicated person and Mgr. Bourget laid the portion of the cemetery so desecrated under an interdict.

†The Catholic Church deprives of Christian burial, those of its members as have been ex-communicated, those who have lived scandalously and given no sign of repentance; suicides; those who have rejected the sacraments; and those who die by duels.

In this connection Rev. Father Stang, in his work on Pastoral Theology, says: "The case which presents itself more frequently than the others mentioned by the council, is that of suicide. The bishop who ought to be consulted *quam primum*, should lean to the side of mercy, as suicide is often the effect of insanity especially with people who have led a practically Christian life."

same right may be employed to take cemetery lands for such public purpose as extending a highway. The state, or the municipality, when authority is delegated to it by the legislature, may forbid the use of a cemetery, or declare it a nuisance and a danger to the public health, and authorize the removal of the dead therefrom; and this may be done by such authorities without recourse to eminent domain proceedings.

Various questions have arisen as to the right of a cemetery lot owner to erect a monument thereon and as to his right to compel the cemetery authorities to keep the cemetery walks and grounds in good order and repair. In the absence of special regulations reserving such matters to the descretion of the cemetery authorities, the right of the lot owner has been affirmed in these particulars. (61 N. W. Rep., 842; 36 S. W. R, 802.)

The heir-at-law has a right of property to the monuments of his ancestors in the grave yard, and may sue any person defacing them. (3 Edw. Ch. R., 155.)

The law is adverse to the disturbance of the dead in their last resting places. In Alabama some years ago cemetery authorities removed the body of a child from a cemetery, which had been discontinued, to another cemetery that had been founded in place thereof, without, however, giving the child's parents notice. The parents recovered damages to the

amount of $1,700 from the cemetery authorities. (18 So. R., 565.)

In many of the states there are statutes making it a criminal offence to remove or deface tombstones, fences, or trees in a cemetery.

XVII.

CHURCH RECORDS.

IN a country like ours, where there is still constant immigration from east to west and north to south, and where families are separated by thousands of miles, the accurate and particular registration of births, deaths and marriages will be of great importance as to future questions of the descent of property and proof of heirship.

The fact that under the police power of the state, physicians, clergymen, and others are obliged to report births, marriages and deaths to a proper county official, makes recourse to church records less frequent now than in other days. Such laws exist in most of the states and their validity has been sustained. (Hamilton vs. Robinson, 14 N. W. Rep., 202.)

At present a marriage registry under the laws of New York or Wisconsin aims to supply this information: Full name of husband, of his father and his mother; maiden name of the wife, her father's name, her mother's name; the time and place of the marriage; the ceremony and by whom performed; color of the parties, and names of subscribing witnesses.

In the case of births the certificate calls for the full name of the father, and the maiden name of the mother, and their respective birthplace; also the names of the other children, of the family, then living.

Public records are admitted as evidence because they are made by authorized persons according to law, and this evidence goes in without the ordinary requirement of an oath and the test of cross-examination. A certified or sworn copy of a public record is also admitted as evidence.

In England, church records are invested with the characteristics of public records, but in the United States, in the absence of statutory provision, this is not the law. Several of the states, such as Massachusetts, have statutes making church records, virtually, public records. Most states (as Wisconsin) admit certified copies of the church records of other states and of foreign countries as evidence bearing on the subject of births, deaths, and marriages.

The English edition of the Roman Ritual prescribes the following books or registers to be kept by every parish priest: Registers of baptisms, confirmations, marriages and deaths. The keeping of the baptismal register is a very ancient practice in the Church. The council of Trent requires parish priests to register also the names of god-parents at baptisms. The same council also made the practice of keeping a record of marriages universally obligatory. The decree requires the priest to enter the names of per-

sons married and the witnesses; and also the date and place where the marriage was celebrated.

It would be well, no doubt, if the records of baptisms kept by churches should also cover the facts of birth even more fully, if possible, than the public registry.

Of course, all church records have an importance as evidence when properly proved.

"We must take notice of a usage so general as that of a church to keep a record. It is also to be considered that the law recognizes the existence of a church as an aggregate body, takes notice of its acts and doings, and annexes thereto various civil rights and powers." 11 Pickering (Mass.), 492.

A clergyman's private records after his death, marriage certificates, and even a certified copy of a marriage certificate (122 Ill., 583) have been admitted in evidence. The records of all private corporations are *prima facie* evidence when their character as official records is established. And there is a presumption (*omnia rite acta*) that what is set down, as transacted, in the minutes was transacted legally by a quorum. Beach on Private Corporations, Sec. 295.

XVIII.

"THE PRIVILEGE OF THE PULPIT."

TO one who has read, in Buckle's History of Civilization, the instances of violent personal harangues from the Scotch Presbyterian pulpits of other days, it is not surprising to find that many suits for slander were brought against these faithful followers of John Knox by their aggrieved parishioners.

The general rules of the law relating to slander are applicable, of course, to the pulpit, with one important qualification affecting the question of malice. Slander is malicious defamation. If the truth of the alleged slander is pleaded in justification, and proven, that is a complete defence. If, however, the defamatory statement is false, the law usually presumes that it is malicious unless the defendant can show that it was "a privileged communication." In that case, malice must be proven by the plaintiff to the satisfaction of the jury. Failing to show that there was malice he cannot recover.

It is usually a question for the judge to decide whether the circumstances constitute the statement made from the pulpit "a privileged communication"

or not. If the statement is made in good faith, in the discharge of a moral or social duty, and to persons having a corresponding interest or duty, it may be regarded as a privileged communication. (More specifically, we should say that it is not absolutely privileged, but belongs to the class which the law regards as "conditionally privileged," that is, privileged on condition that no malice is proven.)

Townshend, in his work on Slander and Libel, (sec. 233) lays down this rule (which is approved in Servatius *vs.* Pichel, 34 Wis., 292):

"The proceedings of the church to enforce its discipline are *quasi* judicial and, therefore, those who complain or give testimony, or act, or vote, or pronounce the result, orally or in writing, acting in good faith, and within the scope of authority conferred by this jurisdiction, and not falsely nor colorably making such proceedings a pretense for covering an intended scandal, are protected by law."

Whether the admonitions of the pulpit, when they take the form of a personal allusion or denunciation, are always privileged communications is by no means clear. Such decisions as we have are varying. Depending upon the opinion of a judge for their privileged character, and depending on the attitude of the jury as to the subsequent question of malice, there are chances which the prudent pulpit will safely avoid.

"The communication of a pastor to his parishioners relating to matters not spiritual is not

necessarily privileged." (Townshend on Slander and Libel, 414.)

Referring to a complaint of pulpit slander, in Hennessey *vs.* Walsh (a Vermont case), 15 Am. L. Reg., 281, Justice Redfield expresses the opinion that it must appear "not only that the charges were false but also malicious, and that the priest used the shield of his office for the mere purpose of wanton defamation. And although it is very common for all ministers, Protestant as well as Roman, to admonish their hearers in no very moderate terms of their short comings in duty, it is presumed few cases will occur where it amounts to slander as above defined."

In Morasse *vs.* Brochu (151 Mass., 567) the facts were as follows; Father Brochu, pastor of a French-Canadian congregation, at Southbridge, Massachusetts, speaking to his congregation, Feb. 27, 1887, said: "During my absence there was a scandal by marriage of law in this parish, and you know who this person is. * * Why do you run after him so? Not long ago I was invited to a party where that person was and I refused to go because I would not meet an excommunicated person. If any of you are sick and want my assistance you need not send for me if this person is there, because I will not be under the same roof with him."

Dr. Morasse was the person mentioned. Having been divorced by his first wife, he had contracted a second marriage before a justice of the peace. He claimed that in consequence of Father Brochu's

remarks his practice fell off to little or nothing The lower court gave him $1,500 damages and the higher court sustained the verdict. Words are held to be actionable *per se* which convey an imputation upon one in his profession or business. In this case, the words spoken by Father Brochu, might, in the opinion of a court, be found by a jury to be spoken in respect to Dr. Morasse's profession, with the meaning that he was an unfit man to be employed by members of the church.

XIX.

SOME CELEBRATED CASES.

I. STACK VS. O'HARA.

THE case of Father Stack against Bishop O'Hara is celebrated as having been in the Pennsylvania courts for ten years (1871-81), twice before the Supreme court, dividing the court in opinion, and the last decision (98 Penn., 213) virtually repudiating principles laid down in the first (90 Penn., 477).

Father Stack had been removed from the mission at Williamsport, Penn., in 1871, his administration of matters being unsatisfactory to Bishop O'Hara. It seems to have been the bishop's intention to give him another parish. Father Stack, a few weeks later, returned to Williamsport, and, having regained possession of the church, applied for an injunction restraining the bishop from removing him or interfering with his discharge of the duties of pastor of the church in question. After much litigation and delay, the court of Common Pleas rendered a decision that the removal of Father Stack, without accusation or trial, was unlawful, but refused restoration; costs

(except Father Stack's bill), to be paid by the bishop.

When the bishop appealed to the Supreme court, and upon re-argument of the case, Chief Justice Sharswood said that the only thing decided was as to the question of costs, and that as this matter, in courts of equity, was left to the discretion of the chancellor, and costs do not necessarily fall upon the losing party, the Supreme court simply declined to disturb the judgment of the lower court in this matter.

But the actual decision of the Supreme court, as rendered by Justice Mercur (90 Penn., 488), hardly admits of this minimizing view. He proclaimed (according to the syllabus in the case) that "the profession of a priest is his property," and that a prohibition of its exercise by the bishop, without accusation or trial, is "contrary to the law of the land."

Following this decision, Father Stack sued Bishop O'Hara for $50,000 damages, but the suit was decided in the bishop's favor in the lower court. Father Stack appealed to the Supreme court, which sustained the verdict of the lower court. In delivering the opinion of the Supreme court (98 Penn., 229, Oct. 3, 1881), Justice Trunkey took occasion to recede from several of the opinions expressed by Justice Mercur for the court in the previous decision (90 Penn., 477). Justice Mercur, however, filed a dissenting opinion, in which he says that the judgment in 98 Penn., 229, "strikes down the cardinal rules of law" affirmed in 90 Penn., 477.

This doctrine is laid down by the Supreme court of Pennsylvania in the final disposition of the Stack vs. O'Hara litigation: "In this country the church is entirely separate from the state. Every church organization is voluntary on part of its members, and the terms and conditions depend entirely on its own rules. The profession of priest or minister in any denomination is taken subject to its laws. These he agrees to obey. If they become distasteful to him, he can withdraw—no power can compel him to remain and discharge his priestly functions; but if he violates the laws of his church, or disobeys the lawful commands made in accord with his compact, the civil courts will not maintain his footing in the church. If the plaintiff was removed in accord with the law of the church, he has no cause of complaint. If such laws provide that the bishop may remove a priest without trial, he has no right to a trial; and if they provide that he shall have recourse to the bishop's superior in case of wrongful removal, his remedy is by such recourse, for this is his contract. . . .

"The foregoing clearly-stated principles repel the conclusion that the plaintiff's removal, if in accord with the law of the church, was contrary to the law of the land. They also show that civil courts will nor interfere where the ecclesiastical courts or officers have jurisdiction and have acted under their own rules, giving them a reasonable application." (98 Penn., 233-4.)

2. MANNIX VS. PURCELL.

From the statements contained in the opinion of the Supreme court of Ohio (Mannix vs. Purcell, 46 Ohio St., 102), it appears that Father Edward Purcell, brother of Archbishop Purcell, of Cincinnati, had for many years (from 1837 to 1879) been receiving deposits from individual Catholics, who preferred to trust him as their banker rather than deposit their funds in the banks. The canon laws of the church forbade this to be done by an ecclesiastic; Father Purcell, however, acted, with the consent of his brother, in this matter, and the latter, in his individual capacity, assumed the entire indebtedness. Both made assignments to Mannix early in 1879, and the claims, proved up to the assignee, amounted to about $2,500,000.

It was sought to charge two hundred pieces of church property in the Cincinnati archdiocese with the unpaid portion of this indebtedness. The title to this property was in John B. Purcell, the archbishop, in fee simple; but the Supreme court admitted parol testimony and the canons and decrees of the Catholic Church regulating the manner of acquiring and holding church property, as competent evidence to show that Archbishop Purcell held this property in trust for religious and charitable purposes. It was held that the property so held in trust by the Archbishop did not pass to his assignee in insolvency for the payment of his individual debts, such

as the indebtedness in question was (with some exceptions) held to be.

3. PRIEST AND BISHOP.

In Rose vs. Vertin (46 Mich., 457). The plaintiff, such as assignee of a claim of Father Bernde for $300 as a priest in Bishop Vertin's diocese. It was held that a bishop is not liable for the salary of a priest whom he has engaged, and that they are fellow-servants of the Church for which the bishop acts merely as a superior agent and not as a principal. The learned justices united in saying that 'the bishop was the priest's superior, and according to the established order of things in the economy of the Church government, regulating the degrees of subordination and the methods of administration, it was the province of the bishop to designate the place for the priest to exercise his functions, and prescribe under certain limitations the rules and precepts for his guidance and control. But both are common servants of the Church, and the service of the priest was not a service for the bishop, nor was the bishop, in respect to the employment, a principal. * * * Men are constantly going into positions under appointment by superior agents, and where no liability for compensation rests on the employing agent, and the means of payment, if they come at all, are to come from another source. Cases of illustration are infinite. They abound in business operations, and

marked instances may be seen in the great missionary enterprises, which are carried on. No one supposes the existence of a legal liability on the part of the employing agency."

Tuigg vs. Sheehan (101 Penn. 363) was a somewhat similar case. Father Sheehan recovered $800 in the lower court on the ground that he was a priest of Bishop Tuigg's diocese, and, although unassigned to a parish, was entitled to decent support under the organic law of the church. The Supreme court held, in reversing this verdict, that "where he [the priest] has an actual contract with his congregation or his bishop for a salary, it may be enforced as any other contract, but where he relies on the duty of his church to support him, he must invoke the aid of the church if he seeks redress. The civil courts wisely decline to interfere in ecclesiastical controversies, except where rights of property are involved."

APPENDIX.

A. CONSTITUTIONAL PROVISIONS.

I. RIGHTS OF CONSCIENCE.

THE provisions of the American State constitutions, which refer to the rights of conscience and guarantee their peaceable exercise, are as follows:

Alabama (I, 4): "No person shall be deprived of the right to worship God according to the dictates of his conscience."

California (I., 4): "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State; . . . but the liberty of conscience hereby secured, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State."

Connecticut (VII., 1.): "It being the duty of all men to worship the Supreme Being, the great Creator and Preserver of the Universe, and their right to render that worship in the mode most consistent with the dictates of their conscience, no

person shall by law be compelled to join or support, or be classed with, or associated to, any congregation, church, or religious association."

Delaware (Preamble): "Through divine goodness all men have, by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences. No power shall or ought to vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control, the rights of conscience in the free exercise of religious worship" (I., 1).

Florida (I., 5): "The free exercise and enjoyment of all religious profession and worship shall forever be allowed in this State; . . . but the liberty of conscience hereby secured, shall not be so construed as to justify licentiousness or practices subversive of the peace and safety of the State."

Georgia (I., 6). "Perfect freedom of religious sentiment shall be and the same is hereby secured, and no inhabitant of this State shall ever be molested in person or property, or prohibited from holding any public office of trust on account of his religious opinion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the people."

Illinois (II., 3): "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; . . but the liberty of conscience hereby secured shall not be

construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State.'

Indiana (II., 2, 3): "All men shall be secured in the natural right to worship Almighty God according to the dictates of their own consciences. No law shall in any case whatever control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."

Iowa (I., 3): "The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Kansas (Bill of Rights, 7): "The right to worship God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted."

Kentucky (XIII., 5): "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. . . . No human authority ought in any case whatever to control or interfere with the rights of conscience."

Louisiana (I., 12): "Every person has the natural right to worship God according to the dictates of his conscience."

Maine (I., 3): "All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences; and no person shall be hurt, molested, or restrained in his person, liberty or estate, for worshipping God in the

manner and reason most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace nor obstruct others in their religious worship."

Maryland (Declaration of Rights, 36): "That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty, wherefore, no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace, or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil, or religious rights."

Massachusetts (I., 2): "It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the Creator and Preserver of the Universe. And no subject shall be hurt, molested, or restrained in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship."

Michigan (IV., 39): "The legislature shall pass no law to prevent any person from worshipping Almighty God according to the dictates of his own conscience."

Minnesota (I., 16): "The right of every man to worship God according to the dictates of his own conscience shall never be infringed . . . . nor shall any control of, or interference with, the rights of conscience be permitted; . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State."

Missouri (I., 9): "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. . . No human authority can control or interfere with the rights of conscience. . . . . But the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace, or safety of the State, or with the rights of others."

Nebraska (I., 16): "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; . . . nor shall any interference with the rights of conscience be permitted."

Nevada (I., 4); "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State; . . . but the liberty hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State."

New Hampshire (I., 4, 5): "Among the natural rights some are in their very nature inalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience. Every individual has a natural and inalienable right to worship God according to the dictates of his own conscience and reason; and no subject shall be hurt, molested, or restrained in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or of his religious profession, sentiments, or persuasion, provided he doth not disturb others in their religious worship."

New Jersey (I., 3): "No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience."

New York (I., 3): "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind; . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."

North Carolina (I., 26): "All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should in any case whatever control or interfere with the right of conscience."

North Dakota: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be forever guaranteed in this State, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."

Ohio (I., 7): "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; . . . nor shall any interference with the rights of conscience be permitted."

Oregon (I., 2, 3): "All men shall be secured in their natural right to worship Almighty God according to the dictates of their own consciences. No law shall in any case whatever control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."

Pennsylvania (I., 3): "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. . . . No human authority can in any case whatever control or interfere with the rights of conscience."

Rhode Island (I., 3): "Every man shall be free to worship God according to the dictates of his own conscience and to profess, and by argument to maintain, his opinion in matters of religion."

South Carolina (I., 9): "No person shall be deprived of the right to worship God according to the dictates of his own conscience, provided that the liberty of conscience hereby declared shall not justify practices inconsistent with the peace and moral safety of society."

Tennessee (I., 3): "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their consciences. . . . . No human authority can in any case whatever control or interfere with the rights of conscience."

Texas (I., 4): "All men have a natural and indefeasible right to worship God according to the dictates of their own consciences. . . . . No human authority ought in any case whatever to control or interfere with the rights of conscience in matters of religion."

Vermont (I., 3): "All men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the Word of God. . . . No authority can or ought to be vested in or assumed by any power that shall in any case interfere with or in any manner control the rights of conscience in the free exercise of religious worship."

Virginia (I., 18): "All men are equally entitled to the free exercise of religion according to the dictates of conscience."

West Virginia (III, 15): "Nor shall any man be enforced, restrained, molested, or burdened in his body or goods, or otherwise suffer, on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion."

Wisconsin (I., 18): "The right of every man to worship God according to the dictates of his own conscience shall never be infringed. . . . . Nor shall any control of, or interference with, the rights of conscience be permitted."

2. RELIGIOUS EQUALITY.

In the Maine Constitution (Art. I, Sec. 3): "No subordination or preference of one sect or denomination to another shall ever be established by law; nor shall any religious test be required as a qualification for any office or trust."

In New Hampshire (Art. VI): "Every denomination of Christians demeaning themselves quietly and as good subjects of the State, shall be equally under the protection of the law and no subordination of any one sect or denomination to another shall ever be established by law."

In Vermont (Ch. I, Art. 3): "No man ought to, or of right can be, compelled to attend any religious worship or erect or support any place of worship, or maintain any minister contrary to the dictates of his

conscience; nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious worship."

The provision of the Rhode Island Constitution (Art. I, Sec. 3,) is substantially identical with that of Vermont as above given.

In New York (Art. I, Sec. 3): "The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State to all mankind."

In New Jersey (Art I, Sec. 3, 4): "No person shall be obliged to pay tithes, taxes or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministers contrary to what he believes to be right, or has deliberately or voluntarily engaged to perform." Furthermore, that "there shall be no establishment of any one religious sect in preference to another, and that no religious test shall be required as a qualification for any civil office or public trust."

The Constitution of Pennsylvania (Art. IX, Sec. 3) provides that "no man can of right be compelled to attend, erect or support any place of worship or to maintain any ministry against his consent," and further that "no preference shall ever be given, by law, to any religious establishments or modes of worship."

The Delaware Constitution (Art. I, Sec. 1) declares that "no man shall or ought to be compelled to attend any religious worship, to contribute to the

erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent." And further that "no religious test shall be required as a qualification to any office or public trust."

The State Constitution of Maryland (Art. XXXVI) declares: "Nor should any person be compelled to frequent, maintain or contribute, unless on contract, to maintain any place of worship, or any ministry."

There is a similar provision in the State Constitution of West Virginia. (Art. XI, Sec 9.)

In the Ohio Constitution (Art. I, Sec. 7) it is declared that "no person shall be compelled to attend, erect or support any place of worship or maintain any form of worship against his consent;" and that "no preference shall be given by law to any religious society." Furthermore, that "no religious test shall be required as a qualification for office."

The Constitution of Michigan (Art. IV, Sec. 39) prohibits the legislature from passing any law to "prevent any person from worshipping Almighty God according to the dictates of his own conscience, or to compel any person to attend, erect or support any place of religious worship," and "no religious test shall be required as a qualification for any office or public trust." (Art. XVIII, Sec. 1.)

In Indiana the State Constitution (Art. I, Sec. 4, 5, and 6,) provides that "no preference shall be given by law to any creed, religious society or mode

of worship," and "no man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent;" and "no religious test shall be required as a qualification for any office of trust or profit."

In Illinois (Art. VIII, Sec. 3 and 4.) the Constitution provides that "no preference shall ever be given by law to any religious establishments or modes of worship" and that "no religious test shall be required as a qualification to any office or public trust."

In Wisconsin (Art. I, Sec. 18.) "No preference shall be given by law to any religious establishments or modes of worship," and "no money shall be drawn from the treasury for the benefit of religious societies or religious or theological seminaries." The Constitution also forbids any religious test as a qualification for any office or public trust. (Art. I, Sec. 19.)

The Constitution of Minnesota (Art. I, Sec. 16, 17) in these particulars, is almost identical with that of Wisconsin.

The Constitution of Oregon also is similar in these provisions to the Constitution of Wisconsin.

The Iowa Constitution (Art. XI, Bill of Rights, Sec. 3 and 4) provides that "the General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," "nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for

building or repairing places of worship or for the maintenance of any minister or ministry." And furthermore that "no religious test shall be required as a qualification for any office or public trust."

The Constitution of Missouri (Art. XI, Sec. 4 and 5) provides that "no man can be compelled to erect, support or attend any place of worship, or to maintain any minister of the gospel or teacher of religion, and that no person on account of his religious opinions can be rendered ineligible to any office of trust or profit," and that "no preference shall ever be given by law to any sect or mode of worship."

The Kansas Constitution (Bill of Rights, Sec. 7) provides that "no preference shall be given by law to any religious establishment or mode of worship;" and that "no religious test or property qualification shall be required for any office of public trust, nor for any vote at any election."

In North Carolina the Constitution (Art. XXIV.) declares that "there shall be no establishment of any one religious church or denomination in preference to any other."

The Georgia State Constitution (Art IV, Sec. 10) provides that "no one religious society shall ever be established in preference to any other; nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles."

The Florida Constitution (Art. I, Sec. 3) provides that "no preference shall ever be given by law to any religious establishment or mode of worship."

The Alabama Constitution (Art. I, Sec. 6 and 7) contains a similar provision, and also prohibits "any religious test as a qualification for any office or public trust."

The constitution of Kentucky (Art. XIII, Sec. 5 and 6) provides that "no preference shall be given by law to any religious society or modes of worship." And further that "the civil rights, privileges or capacities of any citizen shall in no wise be diminished or enlarged on account of his religion."

The provisions of the Constitution of Tennessee (Art I, Sec. 3 and 4), of Arkansas (Art. XI, Sec. 3 and 4), and of Texas (Art. I, Sec. 3, 4 and 5), are almost identical with those of Kentucky.

The Constitution of Mississippi (Art. I, Sec. 3 and 4), provides that "no preference shall ever be given by law to any religious sect or mode of worship;" and further that "the exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons."

B. THE BIBLE IN THE PUBLIC SCHOOLS.

The passage referred to by the Supreme Court of Wisconsin, in the Edgerton Bible decision (see *ante*, p. 21), occurred in the argument of H. J. Desmond, one of the counsel for those objecting to Bible reading in the public schools, and is here subjoined:

I will assume that I am to prove the sectarian character of the King James Bible to the satisfaction of the American Bible Society, who publish the same.

The Mexicans and Pan-Americans, among whom the Bible Societies send their publication, seem to object, through their clergy, to accepting the work. But perhaps this is a prejudice entertained by the Mexican and South American priesthood. It may be asked whether all religion is not founded on the teachings of the Bible: whether it is not the basis of our common Christianity. Can a truly Christian and biblical religion be injured by its perusal? Will those objecting, therefore, show to the American Bible Society how this book injures them; why it is a sectarian book, and why they have any reasonable ground of objection towards it?

Those objecting might then proceed to say that the Protestant Bible has, in their view, many errors of translation; that these mistranslations are made designedly against many Catholic doctrines, so as to raise in the mind of the reader an impression that some Catholic teachings are not scriptural; that the Protestant Bible, furthermore, omits some seventy chapters of the inspired canon; that when Catholics can obtain the correct translation, and the whole Bible, their Church cannot, as a religious guide, advise them to receive a mutilated and prejudicial version, any more than it can advise them to accept a creed with some of its essential portions omitted,

and the meaning of other portions affected by a warped rendering; that the Catholics, having a Bible of their own, which they are taught to revere and study, and having a Church which interprets it for them, it is neither in accord with their faith, nor prudent for them, to take a book printed and circulated by another religious organization, and printed and circulated to be used in the Protestant way: that while the Protestant and Catholic Bibles may have much in common, just as the Catholic and Protestant creeds have much in common, their points of difference are not the less marked than the points of difference between the two creeds, and these points of difference go inseparably with the respective versions, — the Protestant principle of private judgment, determining the use of the Protestant Bible and the Catholic doctrine of the Church as the interpreter of the Bible, being preliminary to the right use of the Bible by Catholics.

But these reasons might not satisfy the American Bible Society. It is extremely difficult for men of one zealous order to consider as reasonable what may be weighty considerations with men of another zealous religious body.

Suppose, however, we appeal to the reports of the Bible Society itself. What do these reports testify? In one instance we have a letter from Bishop Reilly, of the Methodist church, laboring in Mexico for the conversion of its benighted inhabitants from the "errors of Romanism" to those of Methodism. There

is a Methodist church fund at his disposal for this purpose. He writes the Bible Society that he believes he can employ the fund so donated in no way that will more nearly fulfil its object than by buying a consignment of Bibles from the Bible Society. The circulation of the Scriptures is the surest method of overthrowing Romanism. The good Bishop's letter is printed in the reports as an incitement and a stimulant to donors who are similarly minded. "Are you zealous against "Romanism?" Then contribute to get the Scriptures read and circulated in Papal lands, for that is the most effective method of extirpating the Catholic belief." Such is the unwritten lesson.

In the sixty-fourth report, at page 99, the agent of the Society in Uraguay reports two conversions from Romanism, "by the power of God's spirit attending the perusal of the Scriptures, without ever having the opportunity to hear a gospel sermon preached." Fifty-sixth report, page 94: "At our Communion last Sabbath two conversions from Rome were received on confession of the faith. The case of one of these was an interesting testimony in favor of Bible distribution." Fifty-eighth report, page 102 (from Rome), records one hundred and fifteen conversions from "Romanism" amongst the Italian soldiers, through the aid of Bible reading. Fifty-eighth report, page 93, relates a touching incident respecting Senor A , who purchased a Bible from a colporteur. He read it nightly to his house-

hold. "These readings resulted in the three women seeing the errors of Romanism, and the two younger women began attending Protestant churches, about that time started in Toluca."

(I make some ten similar references to these reports in my printed brief. The reports are on file in the State Historical Library.)

Here, then, is testimony that renders it altogether needless to go into elaborate argument with the Bible Society touching the sectarian character of their publication.

Presuming that the Bible Society is composed of honest men; presuming that they agree, as all honest men must, with the Supreme Court of Ohio, when it says (23 O., St. 211,) that "to tax a man to put down his own religion is the very essence of tyranny," I will ask them what do they think of taxing the "Romanists" to pay teachers and warm schoolhouses, where a book is used, that, according to their own reports, exposes the errors of Romanism, and tends to destroy and obliterate that creed; a textbook whose mere reading (as the Uraguay case above noted), without any gospel sermons by way of note or comment, overthrows the Catholic faith in those that listen to it?

If I were addressing the American Bible Society, and asking them to decide the question that this Court is now debating, I anticipate that, as honest men, their decision would be this:

'We have reiterated in our reports that the circulation and reading of our particular version of the

Bible in Papal lands is injurious to the Catholic creed, and helpful to Protestantism. We use the King James version of the Bible as our great missionary text-book in those lands, against Romanism. See our reports.

'Such being the case we cannot, as honest men, pretend that our version has not an anti-Catholic influence when read in the common schools.

'We should be hypocrites to say it is an unsectarian work. We should be double dealers after what we have printed in our reports to ask any board of education to continue its use in the public school as a book equally fair to Catholics and Protestants, and as a work to be used in a school system that attracts Catholic pupils by advertising that its instruction and its books are unsectarian. If we should say that our version of the Bible is death to Romanism in Mexico, and yet harmless to Romanism in Wisconsin, we should be nothing better than common deceivers, equivocators, and liars.'

I dwell thus at length on the position of the American Bible Society, because it is the printer and publisher of every Bible that seeks admission as a text-book or reading manual in the public schools.

If the printer and the publisher must take this position,—and no sane man who is honest enough to face a fact without blinking can doubt that the American Bible Society must take that position or stultify himself,—who is there left to claim that this Bible version is an unsectarian book?

C. DIVORCE IMMORALITY SANCTIONED BY THE STATE.

Theodore D. Woolsey, formerly president of Yale College, in his "Divorce and Divorce Legislation in the United States" (pp. 239-240) forcibly presents this aspect of the evil:

"We admit the justice of the position that the state is not bound to forbid many things which the individual may do in his outward actions which are sins in the sight of God, and even injurious, on the whole, to society. There is a difference between doing this and legalizing what is considered by Christian people to be contrary to the law of the New Testament. All that they ask is, that, in the matter of divorce, the state should abstain from action; that it should enact no laws making immoral separations legal, and thus giving a bounty to immorality. When the state imposes no penalty on drunkenness, or lying, or sabbath-breaking, its attitude is simply negative. And here it does not cut off a remedy, if, by either of these sins, a man inflicts any injury on others, as through violent assault, or slander, or disturbance of the public peace. But when it grants a divorce for a year's desertion, for instance, or for misconduct destroying the happiness of the marriage relation, its action is positive. It removes from the obligations of the marriage relation persons who otherwise would be under them; it grants the power of marrying again to persons who otherwise would have no

such power. Its action, therefore, is not at all like its inaction in cases of individual immorality.

And there is, moreover, a difference between the effects of the two. When sabbath-breaking is not punished by civil law no one would infer that the state thought it right, but when divorce is allowed for causes confessedly not sanctioned by the New Testament, the state steps forward as a teacher of an opposite morality from that of the New Testament. Owing to the manifold relations of marriage, as well to the civil condition as to morality and to religion, people will be very apt to feel that divorce is perfectly right, and the influence of bad doctrine thus taught by the state will run over within the pale of the church, to divorce it from Christ's law, to trouble it with many perplexing questions, to injure its discipline and its purity. This must be true in Catholic lands, if the law of the church and the law of the state are at variance; how much more must it be so in Protestant or mixed countries, where there is no such distinct and sweeping law of church action as the Catholic doctrine of the sacramental quality of marriage."

D. PROVISIONS OF THE WISCONSIN REVISED STATUTES OF 1898, RELATING TO THE INCORPORATION OF CATHOLIC CONGREGATIONS.

NOT WITHIN CH. 91; trustees. Section 2001–10. The provisions of this chapter, except such as are contained in this and the seven next following sections, shall not apply to or in any manner affect the Roman Catholic church or denomination, or any society or religious corporation now existing or which may be organized in connection therewith. The bishop of each diocese, being the only trustee of each Roman Catholic church in his diocese, may cause any or all congregations therein to be incorporated by adding four members as trustees as hereinafter provided. The bishop and vicar-general of each diocese, the pastor of the congregation to be incorporated, together with two laymen, practical communicants of such congregation (the latter to be chosen from and by the congregation), shall be such trustees.

(This and the next seven sections were written from sec. 2001 b, Ann. Stats., being ch. 37, 1883, as amended by ch. 313, 1889.)

POWERS. Section 2001–11. Such corporation shall assume an appropriate name in its articles of incorporation, and may purchase, accept, own, and hold property, real and personal, and sell, convey, and otherwise dispose of the same, and contract debts, all of which shall be done subject to the by-

laws and the restrictions hereinafter provided. Such corporation may sue and be sued, have a common seal, which may be changed at pleasure, and do all things necessary for the proper transaction of its business and duties and all things needful in the management of the temporal affairs of the Roman Catholic church of such congregation, and for the benefit thereof and of such members as may become attached and belong to said church in conformity with such rules and regulations as may be established by its by-laws; and also to purchase, own, hold, regulate, control, manage or dispose of any eleemosynary, educational, cemetery, religious, or other property which it may acquire in connection with said church and the congregation thereof or be assigned to it by the bishop or other person or persons.

Bishop, Vicar-General, Pastor. Section 2001-12. The said bishop and vicar-general shall be and remain members of such corporation as long as they shall be and remain respectively bishops and vicar-general of said diocese; and said pastor shall be and remain a member thereof, so long as he shall be and remain pastor of said congregation; and whenever either or all of them shall cease to be bishop, vicar-general or pastor, as aforesaid, their respective successors, as such bishop, vicar-general, or pastor, shall become their respective successors as members of such corporation, and in like manner they shall have perpetual succession. The said bishop and

vicar-general, or either of them, may be represented at any meeting of said congregation or at any meeting of the directors by proxy with like effect as if personally present. The said two laymen shall be and remain members of said corporation for the term of two years and until their successors, who in all cases shall be laymen, are chosen or selected as provided by the by-laws. In case of a vacancy in the office of bishop of said diocese, the administrator thereof, or such other person as may be appointed according to the rules of the Roman Catholic Church to preside over and administer the spiritual and temporal affairs of said diocese, shall be, while he is such administrator or appointee, a member of such corporation in the place and stead of the bishop of said diocese, and have the same power and authority in such corporation as said bishop would have.

OFFICERS; BONDS. Section 2001-13. The officers of such corporation shall be a president, vice-president, treasurer and secretary. The bishop, his successor or administrator thereof, or such other person as may be appointed according to the rules of the Roman Catholic church, or administrator for the time being, shall be president; the pastor shall be vice-president ex-officio, and the treasurer and secretary shall be selected or chosen from among the laymen as provided by the by-laws. In all cases the treasurer shall be required to give bond to such corporation in such sum and with such sureties as the directors shall require, conditioned that he will faith-

fully account for and pay over all moneys that may come into his hands as such treasurer and otherwise faithfully discharge the duties of his office, which bond shall, before he enters upon such duties, be approved by the president, vice-president, and secretary by indorsement made thereon. Whenever the secretary or treasurer shall, after due notice, neglect or fail to attend the meetings of the directors or attend to the business of such corporation, his office shall be declared vacant by the remaining directors and such vacancy be filled by them.

DEBTS; SALE OF REALTY. Section 2001-14. The bishop or administrator, the vicar-general, pastor, treasurer, and secretary shall be ex-officio directors of such corporation. They may, by a majority vote, contract debts not exceeding in amount the sum of three hundred dollars; but debts in excess of that sum may be contracted by the consent and vote of all the directors; such debt may be evidenced by a note or other evidence of debt and may be secured by a mortgage on the property of such corporation, but such note, other evidence of debt or mortgage, shall not be construed as implying any covenant for the payment of the sum thereby intended to be secured on the part of any of said directors, but the remedies of the payee or mortgagee named therein shall be confined to the lands and property of such corporation. The real estate of the corporation shall not be sold, mortgaged, incumbered, or dis-

posed of in any manner without the vote and consent of all the directors.

By-Laws. Section 2001–15. The directors, by unanimous vote, may adopt such by-laws, not contrary to the constitution and laws of this state, the statutes of the diocese and the discipline of the Roman Catholic church, as may be deemed necessary for the proper government of such corporation and the management and business thereof or the temporal affairs of such congregation which may become connected therewith or attached thereto. Said by-laws may be altered or amended in the same manner as by-laws are herein required to be adopted and not otherwise; and whenever so adopted or amended shall, before taking effect, be recorded by the secretary in a book to be kept for that purpose and be subscribed to by each of said directors.

Articles of Incorporation. Section 2001–16. Whenever any of said congregations have complied with the foregoing provisions the articles of incorporation thereof shall be made out accordingly, be signed by the president and secretary in the presence of two witnesses, who shall sign their names thereto, and acknowledged before some notary public or other person authorized by law thereto, and filed in the office of the secretary of state and of the register of deeds in the county or counties where such corporation may own real estate.

Title to Property on Dissolution. Section 2001–17. Whenever any such corporation shall

become defunct or be dissolved the property thereof shall vest in the bishop of the diocese in which such corporation is located, and if within three years from the date of such dissolution said congregation be re-incorporated in the manner prescribed by sections 2001–10, 2001–11, and 2001–16 the said property so belonging to such defunct or dissolved corporation at the time of its dissolution shall vest in such new corporation.

E. RELIGIOUS TERMS IN COURT.

The New Hampshire Supreme Court (Hale *vs.* Everett, 53 N. H., 9), defines the term Christian to include "Protestants and Roman Catholics, but not Mohammedans, Jews, Pagans, or infidels."

"Catholics—a designation which, if not common to every branch of the Christian church, is certainly not exclusively applicable to the particular branch [Roman Catholics], whose members claim under this deed." 4 Gill (Md.), 405.

The Connecticut Supreme Court has defined Protestants to include "all those who believe in the Christian religion, but do not acknowledge the supremacy of the Pope." 52, Conn. 418. 53, Conn. 493.

"An atheist is without any religion, true or false. The disbelieving in the existence of any God is not a religious, but an anti-religious sentiment." Thurston *vs.* Whitney, 2 Cushing (Mass.), 104.